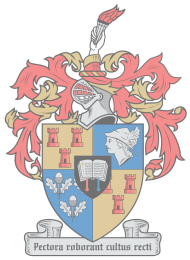
“Gathering” on privately owned property: An analysis of the Regulation of Gatherings Act 205 of 1993

Liam Nicolas Moses



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Supervisor: Dr BV Slade

Department of Public Law

Faculty of Law

Stellenbosch University

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DECLARATION

By submitting this thesis electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Liam Nicolas Moses

February 2018, Stellenbosch

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This thesis is dedicated to my parents, who have made immeasurable sacrifices to allow my sister and I to live our dreams.

SUMMARY

One of the primary reasons for the promulgation of the Regulation of Gatherings Act 205 of 1993 ("Gatherings Act") was to repeal certain statutes that heavily restricted the ability of people to protest before and during apartheid. These apartheid-era statutes granted various state functionaries the power to prohibit gatherings. The end of apartheid indicated a break from the heavily restricted manner in which assemblies were regulated. The move away from the restrictive regulation of protests towards the constitutional protection of protests started with the establishment of the Goldstone Commission, and the protection of the right to assemble and demonstrate in the Interim Constitution of 1993. This was followed by the promulgation of the Gatherings Act and the recognition and protection of the right to assemble and demonstrate in the Constitution of the Republic of South Africa, 1996.

The definition of a gathering in section 1 of the Gatherings Act and its relationship with privately owned property received renewed attention when student protests across the country flared up in 2015. The increase of student protests led to the main research question of this thesis: whether the definition of a gathering in the Gatherings Act extends to privately owned property. If it does, the second question is whether the Gatherings Act permits a deprivation of property in conflict with section 25(1) of the Constitution.

With regard to the first question, case law and academic commentary indicate that the Gatherings Act does indeed extend to privately owned property. The Gatherings Act will, however, only extend to private owned property if it is accessible to the public, and if it is open-air or not confined to the walls of a building. The second question required an extensive analysis of case law and academic commentary on section 25(1) of the Constitution. It was found that only private owners may rely on section 25(1), and the actions typically associated with gatherings would be sufficient for a gathering to amount to a deprivation of their property. It is easier for the deprivation permitted by the Gatherings Act to comply with two of the three requirements for a valid deprivation: that the deprivation be in terms of law of general application and that it be procedurally non-arbitrary. The third of these requirements – that the deprivation be substantively non-arbitrary – was more complicated, because determining the substantive non-arbitrariness would depend on the facts of each case. In this regard, courts should determine substantive non-arbitrariness with reference to the complexity

of constitutional rights being invoked during a gathering, but more significantly, the importance of holding a gathering in close proximity to privately owned property.

This thesis thus concluded that the need for a new framework for the regulation of Gatherings in the new constitutional dispensation was necessary, especially given the manner in which protests were regulated before and during apartheid. The Gatherings Act serves as this new legislative framework, and extends to gatherings held on privately owned property in certain circumstances. It was found that while the Gatherings Act may permit a deprivation of property, this deprivation may be justified, depending largely on the content of the gathering itself.

OPSOMMING

Een van die hoofredes vir die verordening van die Wet op die Regulering van Byeenkomste 205 van 1993 ("Byeenkomstewet") was om sekere wetgewing te herroep wat mense verbied het om voor en tydens die era van apartheid te protesteer. Hierdie apartheidswetgewing het aan verskeie staatsinstellings die mag verleen om byeenkomste te verbied. Die einde van apartheid het 'n breek met die verlede aangedui met betrekking tot die wyse waarop byeenkomste gereguleer was. Die wegbeweeg van die streng regulering van protes tot die grondwetlike beskerming van protes het begin met die instelling van die Goldstone-kommissie en die beskerming van die reg om te vergader en te betoog in die Interim Grondwet van 1993. Dit is opgevolg deur die verordening van die Byeenkomstewet en die erkenning en beskerming van die reg om te vergader en betoog in die Grondwet van die Republiek van Suid-Afrika, 1996.

Die definisie van `n byeenkoms ingevolge artikel 1 van die Byeenkomstewet en die verhouding met die privaatbesit van eiendom het hernude aandag ontvang toe studente-protes regoor die land in 2015 toegeneem het. Hierdie toename in studente-protes het gelei tot die hoofnavorsingsvraag van hierdie tesis, naamlik of die definisie van `n byeenkoms ingevolge die Byeenkomstewet strek tot eiendom in privaatbesit. As dit wel die geval is, is die tweede vraag of die Byeenkomstewet `n ontneming van eiendom in stryd met artikel 25(1) van die Grondwet veroorloof.

Met betrekking tot die eerste vraag, dui regspraak en akademiese kommentaar daarop dat die Byeenkomstewet inderdaad tot eiendom in privaat besit strek. Die Byeenkomstewet sal egter slegs tot eiendom in privaat besit strek as dit toeganklik is vir die publiek, en dit oop of nie beperk tot die mure van `n gebou is nie. Die tweede vraag het `n uitgebreide ontleding van regspraak en akademiese kommentaar op artikel 25(1) van die Grondwet vereis. Daar is bevind dat slegs privaateienaars op artikel 25(1) kan staatmaak en die aksies wat tipies met byeenkomste geassosieer word, sal voldoende wees vir `n byeenkoms om `n ontneming van eiendom daar te stel.

Dit is makliker vir die ontneming wat deur die Byeenkomstewet toegelaat word om aan twee van die drie vereistes vir `n geldige ontneming te voldoen: dat die ontneming plaasvind in terme van `n wet van algemene toepassing en dat dit prosedureel nie-arbitrêr is. Die derde van hierdie vereistes – dat die ontneming substansieel nie-arbitrêr moet wees – was meer ingewikkeld, omdat die bepaling van die substantiewe

nie-arbitrêrheid afhang van die feite van elke saak. In hierdie verband moet die howe substantiewe nie-arbitrêrheid bepaal met betrekking tot die kompleksiteit van grondwetlike regte wat tydens `n byeenkoms aangewend word, maar van nog meer betekenis, die belangrikheid om `n byeenkoms in die noue nabyheid van eiendom in privaat besit te hou.

Hierdie tesis het dus tot die gevolgtrekking gekom dat die behoefte vir `n nuwe raamwerk vir die regulering van byeenkomste in die nuwe grondwetlike bestel nodig was, veral as gevolg van die wyse waarop protes voor en tydens apartheid gereguleer was. Die Byeenkomstewet dien as hierdie nuwe wetgewende raamwerk, en strek tot byeenkomste wat in sekere omstandighede op eiendom in privaat besit plaasvind. Daar is bevind dat terwyl die Byeenkomstewet `n ontneming van eiendom mag toelaat, hierdie ontneming geregverdig kan word, afhangend van die inhoud van die byeenkoms self.

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CHAPTER 1: INTRODUCTION

1 1 Background to the research problem

In *Victoria and Alfred Waterfront (Pty) Ltd v Police Commissioner, Western Cape (Legal Resources Centre as Amicus Curiae)* ("*Victoria and Alfred Waterfront*"),[1] the owners of a waterfront shopping complex wanted to prevent certain persons from entering the complex on a permanent basis. The owners sought the ban against these individuals because they had previously conducted themselves in a disorderly manner. This prior disorderly conduct included acts of intimidation, alleged sexual misconduct, interference with clients and assault. Their primary purpose for entering the waterfront premises was to beg for money, food and other items. The shopping complex was privately owned, but was open to the public. Members of the public were invited to visit and utilise the restaurants, shops and entertainment facilities on offer, regardless of whether they intended to conduct business at any of these establishments. The shopping complex was also unique, because it contained a police charge-office, post office and the only formal facility for members of the public to transfer to Robben Island.

The court had to consider whether the owner's right to exclude could justify an outright ban of these persons from the premises, or whether the right to exclude should be limited with due regard to the right to life and right to freedom of movement of the affected individuals. It then had to determine whether upholding the outright ban in favour of the owners' right to exclude, and the subsequent limitation of the right to life and right to freedom of movement of the banned individuals, was justifiable. The court stated that the tension between the property rights of the property owner on the one hand, and the rights of the banned persons on the other, should be resolved in a manner that "permits the rights of both parties to be vindicated to the greatest extent possible."[2] The court found that the actions caused by the persons that infringe the rights of the property owner could be prevented without resorting to an outright ban on

[1] 2004 4 SA 444 (C).

[2] *Victoria and Alfred Waterfront (Pty) Ltd v Police Commissioner, Western Cape (Legal Resources Centre as Amicus Curiae)* 2004 4 SA 444 (C) 452.

these persons.[3] It concluded that in cases where the right to life depends on access to the property of another, the owner's right to exclude should be limited.[4]

In *Growthpoint Properties Limited v South Africa Commercial Catering and Allied Workers Union (SACCAWU)* ("*Growthpoint*"),[5] members of a trade union occupied the basement parking lot of a shopping mall. The occupation of the parking lot formed part of a picket against the employer of the members of the trade union. The business premises of the employer formed part of the shopping mall, so it was necessary for the picketers to enter the shopping mall premises to perform the picket. The shopping mall was privately owned, and the owner of the shopping mall leased the business premises to the employer targeted by the picket. The entry of picketers onto the premises of the privately owned shopping mall, in order to direct a picket at the lessee of the property owner, brings into question a number of issues.

The court described the problem before it as one requiring a balancing of "the right of owners and occupiers to their property, to the environment and to trade on the one hand, and the right of strikers to freedom of expression, to bargain collectively, to picket, protest, and demonstrate peacefully on the other hand."[6] The court resolved the dispute in terms of the Labour Relations Act 66 of 1995, which regulates pickets in support of a strike.[7] The conflict between the "rights of owners and occupiers to their property"[8] on the one hand, and the right of the trade union to "picket, protest and

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[3] *Victoria and Alfred Waterfront (Pty) Ltd v Police Commissioner, Western Cape (Legal Resources Centre as Amicus Curiae)* 2004 4 SA 444 (C) 452.

[4] *Victoria and Alfred Waterfront (Pty) Ltd v Police Commissioner, Western Cape (Legal Resources Centre as Amicus Curiae)* 2004 4 SA 444 (C) 448. P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch (2015) 182 argues that property is inherently limited, and the owners' right to exclude is thus not absolute. See also AJ van der Walt "The modest systemic status of property rights" (2014) 1 *Journal of Law, Property, and Society* 15 49-51.

[5] 2010 JDR 1015 (KZD).

[6] *Growthpoint Properties Limited v South Africa Commercial Catering and Allied Workers Union (SACCAWU)* 2010 JDR 1015 (KZD) para 1.

[7] Section 69 of the Labour Relations Act 66 of 1995 regulates picketing.

[8] *Growthpoint Properties Limited v South Africa Commercial Catering and Allied Workers Union (SACCAWU)* 2010 JDR 1015 (KZD) para 1.

demonstrate peacefully"[9] on the other hand, was not considered by the court.[10] While the balancing of these rights is what the court intended and claimed to do,[11] the decision to resolve the matter in terms of the Labour Relations Act instead leaves the issue of balancing property rights with the right to assemble and demonstrate unresolved.[12]

These cases raise a number of incidental issues that led to the motivation for this thesis. It highlights the fact that a property owner does not have an absolute right to exclude others from her property. In *Victoria and Alfred Waterfront*, the owner's right to exclude was limited in order to protect the rights to life and freedom of movement of other persons. In this regard, it needs to be determined whether an owner's right to exclude can similarly be limited when other non-property constitutional rights, such as the right to assemble and demonstrate, are exercised on privately owned property. This question became pertinent with the increase in student protests since 2015,[13] where students gathered on privately owned university property, and were often excluded from the property when universities relied on interdicts to enforce their right to exclude against the students.[14]

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[9] *Growthpoint Properties Limited v South Africa Commercial Catering and Allied Workers Union (SACCAWU)* 2010 JDR 1015 (KZD) para 1.

[10] AJ van der Walt "The modest systemic status of property rights" (2014) 1 *Journal of Law, Property, and Society* 15 77 argues that the balancing had already been performed and determined under the Labour Relations Act 66 of 1995.

[11] *Growthpoint Properties Limited v South Africa Commercial Catering and Allied Workers Union (SACCAWU)* 2010 JDR 1015 (KZD) paras 60; 62.

[12] Despite the question being left unanswered by the court, the case was correctly decided in terms of the subsidiarity principles, which requires reliance on legislation giving effect to a particular constitutional right, rather than the constitutional right itself. See further *South African National Defence Union v Minister of Defence* 2007 8 BCLR 863 (CC) para 51; P de Vos & W Freedman (eds) *South African constitutional law in context* (2014) 586.

[13] See L Naidoo "Contemporary student politics in South Africa" in A Heffernan & N Nieftagodien (eds) *Students must rise: Youth struggle in South Africa before and beyond Soweto '76* (2016) 180 180-190; J Jansen *As by fire: The end of the South African university* (2017) 1-2.

[14] See for example *Rhodes University v Student Representative Council of Rhodes University* 2017 1 All SA 617 (ECG); S Wilson & I de Vos in *Ex Parte: Council for the Advancement of the South African Constitution In Re: Restraint of protest on or near university campuses* Chambers, Johannesburg (22 December 2016) paras 8-13; L Naidoo "Contemporary student politics in South Africa" in A Heffernan & N Nieftagodien (eds) *Students must rise: Youth struggle in South Africa before and beyond Soweto '76* (2016) 180 187-189.

Furthermore, the picket in *Growthpoint* was regulated in terms of section 69 of the Labour Relations Act. In terms of section 69(2), a picket may be held "in any place to which the public has access but outside the premises of an employer" or on the employers premises with her permission, despite "any law regulating the right of assembly". For purposes of this thesis, this provision may have two major implications on the rights of private property owners. Firstly, it grants picketers the power to perform a picket in any place, provided the public has access to such place. This provision does not distinguish between privately owned property and publicly owned property. Instead, the provision merely limits its application to places that are publicly-accessible. Therefore, it is clear that picketers may enter privately owned property to perform a picket, provided the property is accessible to the public. This was the case in *Growthpoint*, because the picketers were required to enter the privately owned shopping mall in order to direct the picket at its employer, whose premises formed part of the privately owned shopping mall.

Secondly, the provision grants employees the power to picket on the premises of the employer, provided permission from the employer is obtained. There may be cases in which the employer is a private business owner, and other cases where the employer is the state. In terms of this provision, employees could thus exercise their right to picket on privately owned property, regardless of whether they are accessible to the public or not. Therefore, this provision shows that a picket may be held on privately owned property if certain requirements are met. In this regard, it needs to be determined whether gatherings in terms of the Regulation of Gatherings Act 205 of 1993 ("Gatherings Act") may be held on privately owned property, which is the case with pickets in terms of the Labour Relations Act.

Growthpoint, therefore, opens the possibility to question whether the Gatherings Act similarly permits gatherings on privately owned property, provided they are accessible to the public. It also raises the question of whether it is possible for people to exercise their right to assemble and demonstrate on the privately owned property of the intended recipient of the assembly or demonstration. It is likely that this would only be permissible should the assemblers or demonstrators and the property owner have a similar relationship to the relationship between an employer and an employee, because this relationship forms the basis for allowing employees to picket on an employer's premises.

1 2 Research problem, research aims, hypotheses and methodology

This thesis aims to establish whether the Gatherings Act permits a gathering on privately owned property. Once this is established, it will then be considered whether the Gatherings Act permits a deprivation of property in conflict with section 25(1) of the Constitution of the Republic of South Africa, 1996, and, if so, in which circumstances.

In order to do so, a comprehensive discussion on the right to assemble and demonstrate before and during apartheid is necessary. This will involve a historical overview of the right before the constitutional dispensation, and will include an analysis of legislation used to suppress mass political dissent. Furthermore, an analysis of the right in the new constitutional dispensation will highlight the position and protection of the right since the end of apartheid. This discussion will be based on the premise that this right was formerly suppressed, but is now a justiciable right in the Bill of Rights.

The Gatherings Act was promulgated as a response to a long history of suppression of the right to freedom of assembly under apartheid. This suppression was imposed through the enactment of legislation to curb the effects of resistance against the apartheid government.[15] The operation of these statutes can be seen in a number of cases. For instance, in *PG Castel NO v Metal & Allied Workers Union,*[16] the wide powers of the Minister of Law and Order to prohibit a gathering were confirmed,[17] provided they were exercised in accordance with section 46(3) of the Internal Security Act 74 of 1982. In terms of section 46(3), the Minister of Law and Order could prohibit any gathering or any class of gathering if he was of the view that it will maintain public peace. Similarly, in *S v Turrell*,[18] the powers of the Minister of Justice were confirmed as being just as broad, because it granted him the power to prohibit particular gatherings.[19] These cases display the wide powers authorities had in attempting to

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[15] These statutes include, *inter alia*, the Suppression of Communism Act 44 of 1950, the General Law Amendment Act 8 of 1953, the Riotous Assemblies Act 17 of 1956, the Internal Security Act 74 of 1982 as well as regulations handed down in terms of the Public Safety Act 3 of 1953.

[16] 1987 4 SA 795 (A).

[17] *PG Castel NO v Metal & Allied Workers Union* 1987 4 SA 795 (A) para 14.

[18] 1973 1 SA 248 (C).

[19] In this case, the court held that a magistrate may only prohibit a particular gathering from occurring under section 2 of the Riotous Assemblies Act 17 of 1956, and not a particular class of gatherings, which was a power vested only in the Minister of Justice.

curb resistance towards the apartheid government, and how the need for a new constitutional dispensation giving effect to assembly rights had become necessary.

The Gatherings Act was promulgated after the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation ("Goldstone Commission") created a new legislative framework for the right to assemble and demonstrate, and is the only statute that deals with gatherings generally. Therefore, the Gatherings Act, as the primary source regulating gatherings, will be analysed with reference to cases that have considered whether the procedures set out in the Act have been followed. The requirements for a lawful gathering in sections 2, 3 and 4 of the Gatherings Act need to be met before a lawful gathering may commence. These requirements are in place to ensure that the Gatherings Act fulfils its purpose, which is to "regulate the holding of public gatherings and demonstrations at *certain places*; and to provide for matters connected therewith."[20] The definition of a gathering will subsequently be considered in light of the fact that it may extend to privately owned property. According to section 1 of the Gatherings Act, a "gathering" is defined as:

> "…any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 1989 (Act 29 of 1989), or any other public place or premises wholly or partly open to the air-
> (a) at which the principles, policy, actions or failure to act of any government, political party or political organization, whether or not that party or organization is registered in terms of any applicable law, are discussed, attacked, criticized, promoted or propagated; or
> (b) held to form pressure groups, to hand over petitions to any person, or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution".[21]

The phrase "or any other *public place or premises* wholly or partly open to the air"[22] is of particular importance for this study, as it has not yet been authoritatively interpreted by the courts. The interpretation of this term will aid in determining the circumstances in which the definition of a gathering extends to privately owned

[20] Preamble of the Regulation of Gatherings Act 205 of 1993. Own emphasis.
[21] Section 1 of the Regulation of Gatherings Act 205 of 1993.
[22] Own emphasis.

property. This interpretation will involve the use of foreign cases and academic commentary to determine when a place or premises may be considered "public" for purposes of the definition of a gathering. These sources will illustrate how courts have dealt with situations where people gathered on privately owned property, in order to determine the circumstances in which a place or premises may be considered "public" for purposes of the Gatherings Act.

Given the circumstances in which the legislative scheme permits a gathering on privately owned property, it is necessary to investigate how the right to assemble and demonstrate, when exercised on privately owned property, impacts on the property rights of the property owner. In particular, the impact and role of section 25(1) of the Constitution will be assessed. Due to the uncertainty regarding the manner in which this conflict should be resolved, an analysis of cases will be used to emphasise the fact that private property rights may be limited by other constitutional rights. This uncertainty arises from the fact that such a case is yet to be decided by the courts in South Africa. In *Growthpoint*, the court held that the owners of the shopping mall had a right "not to be arbitrarily deprived of the use of their property as a result of the noise [caused by the picketers]".[23] However, the finding that they suffered an "unacceptable and unjustifiable limitation on their right to their property"[24] was not based on an analysis on section 25(1) of the Constitution,[25] but instead on the relevant sections of the Labour Relations Act. The failure by the court to perform an analysis based on section 25(1), means that there may be a possibility that section 25(1) could play a role in situations where legislation fails to offer guidance on how these types of disputes should be resolved. Therefore, the need to determine whether private property owners may rely on section 25(1) of the Constitution when a lawful gathering is held on their property becomes relevant. Foreign cases will be used to illustrate situations where property rights came into conflict with the right to assemble and

[23] *Growthpoint Properties Limited v South Africa Commercial Catering and Allied Workers Union (SACCAWU)* 2010 JDR 1015 (KZD) para 30.

[24] *Growthpoint Properties Limited v South Africa Commercial Catering and Allied Workers Union (SACCAWU)* 2010 JDR 1015 (KZD) para 60.

[25] Section 25 of the Constitution was only mentioned in a footnote to para 9 of *Growthpoint Properties Limited v South Africa Commercial Catering and Allied Workers Union (SACCAWU)* 2010 JDR 1015 (KZD), which contained a brief analysis of the constitutional rights in question.

demonstrate, and the manner in which this conflict was resolved by the courts of foreign jurisdictions will aid in determining the manner in which this problem could be solved by South African courts.

Given this conflict, it is necessary to consider whether the Gatherings Act permits a deprivation of property in a manner inconsistent with section 25(1) of the Constitution. The conflict between property rights and the right to assemble and demonstrate will thus need to be considered, keeping in mind that the right to assemble and demonstrate is often interlinked with the right to freedom of expression. Furthermore, policy reasons may indicate that it is important to hold a gathering on privately owned property, and these reasons will need to be assessed in light of the importance of the right to assemble and demonstrate, as well as the right to freedom of expression. This should yield an answer as to whether the exercise of these rights during a gathering may place a limitation on the rights of the property owner, and may thus be justifiable in terms of section 25(1) of the Constitution.

The question of whether a “gathering” in terms of the Gatherings Act permits a deprivation of property in a manner inconsistent with section 25(1) of the Constitution is of vital importance due to the reasons outlined above. The above analysis of the research problem serves as a starting point in determining whether the deprivation permitted by the Gatherings Act is in accordance with section 25(1) of the Constitution, and whether the Gatherings Act places a justifiable limitation on the rights of a property owner in terms of section 25(1).

1 3 Outline of substantive chapters

Chapter two focuses on the history of the right to assemble and demonstrate in South Africa. This will involve a discussion on gatherings before and during apartheid, with a particular focus on legislation that was promulgated to suppress mass government resistance. The impact of this legislation will be assessed by discussing the manner in which courts applied the legislation that restricted the ability to assemble and demonstrate. In the new constitutional dispensation, the right to assemble and demonstrate was included as a justiciable right. Given the clear break from the suppression of assembly and demonstration, the focus of the chapter will then shift to the manner in which the right to assemble and demonstrate is recognised in the new constitutional dispensation. Reference will be made to the protection of the right in the

Constitution of the Republic of South Africa Act 200 of 1993 ("Interim Constitution"), which recognised the right to assemble, demonstrate and present petitions. Furthermore, the role of the submissions made by the multinational panel to the Goldstone Commission will be assessed, with a particular focus on the submissions regarding notice of a gathering and negotiations before a gathering. The work of the Goldstone Commission led to the promulgation of the Gatherings Act, which will be discussed with reference to the purpose and role of the Act in the new constitutional dispensation. The protection afforded to the right to assemble and demonstrate by the Constitution will be evaluated, by referring to the process that led up to the drafting of the right, and the inclusion of the right to assemble, demonstrate, picket and present petitions in the 1996 Constitution.

Chapter three focuses on a "gathering" in terms of the Gatherings Act. The requirements for holding a lawful gathering will be discussed, with a focus on the procedures to be followed immediately before the commencement of a gathering. These include notice of a gathering, the appointment of key persons involved before and during a gathering, the amendment of notices, conditions placed on gatherings, time periods, logistics and the behaviour of participants during a gathering. The definition of a "gathering" will be analysed, and it will be used to determine whether it extends to privately owned property and, if so, to what extent. This analysis will focus on privately owned places or premises that qualify as "public" for purposes of the definition of a gathering. In this regard, reference will be made to certain characteristics of privately owned property that may render it public. These characteristics will be drawn from various sources, including apartheid-era legislation that regulated assemblies and demonstrations, as well as cases and commentary dealing with the public-accessibility of privately owned places. The characteristics will also be drawn from commentary on the relationship between public places and the ability to evict unwanted persons from privately owned property, as well as commentary and cases on circumstances that may change the public nature of privately owned property. Furthermore, an interpretation will be given to the phrase "wholly or partly open to the air" to further qualify the types of privately owned property on which a gathering may be held. This qualification will be determined with reference to academic commentary and apartheid-era legislation, and will aid in determining the types of privately owned property to which the Gatherings Act applies.

Chapter four focuses on whether the Gatherings Act permits a deprivation of property in a manner inconsistent with section 25(1) of the Constitution. In this regard, the beneficiaries of section 25(1) of the Constitution will be discussed, with reference to case law and academic commentary. The definition of a deprivation will then be established, with reference to jurisprudence from the Constitutional Court and academic commentary. Actions typically associated with a gathering will then be tested against this definition to display the manner in which a gathering permits a deprivation of property. The requirements for a valid deprivation in terms of section 25(1) – that the deprivation be in terms of law of general application and that it be non-arbitrary – will be outlined. The law of general application requirement will likely be uncomplicated, since the Gatherings Act is the law central in solving the primary research problem. However, the arbitrariness inquiry will be more complicated, because the deprivation should be both procedurally and substantively non-arbitrary. The procedural non-arbitrariness requirement will need to be distinguished from procedural fairness in administrative law. In this regard, the relationship between section 33 of the Constitution, the Promotion of Administrative Justice Act 3 of 2000 and section 25(1) of the Constitution will need to be outlined before a determination on the procedural non-arbitrariness of the deprivation can be made. It is difficult, if not impossible, to determine – in the abstract – whether a gathering held on privately owned property will be substantively arbitrary. The inquiry into whether a deprivation is substantively arbitrary will depend on the facts of each particular case. However, it is possible to identify various factors that the court could consider when determining whether sufficient reason for a gathering on privately owned property exists. Sufficient reason for the deprivation permitted by the Gatherings Act will be determined by referring to the Gatherings Act itself, the complexity of constitutional rights being exercised by participants during a gathering, and the importance of the proximity of a gathering to the privately owned property. These factors will thus identify the circumstances in which sufficient reason for permitting a gathering on privately owned property exists.

1 4 Limitations and qualifications

This thesis will be subject to various qualifications, and will be limited in scope regarding a number of issues. Firstly, the use of foreign jurisdictions will not serve to

compare the South African position to the position of a foreign jurisdiction. While a comparative analysis between South Africa and another jurisdiction would be useful to compare two clear legal positions from two different jurisdictions, the position regarding the primary research problem is not clear under South African law. The research problem central to this thesis has not yet been adjudicated by a local court, so this thesis will primarily aim to address the problem, rather than compare the South African position with the position of a foreign jurisdiction. Therefore, since the position in South African law is unclear, it would instead be more fruitful to use foreign law as an interpretive source to help find a solution to the research problem. In this regard, foreign cases and foreign commentary from various jurisdictions will be used to illustrate certain points, and offer guidance on how to resolve certain issues that are yet to be adjudicated by the courts in South Africa.

Secondly, this thesis does not consider section 17 of the Constitution in its entirety. While section 17 also recognises the right to picket and present petitions, it remains beyond the scope of this thesis. The right to picket was not included in section 23 of the Constitution, because this section deals with labour relations and the drafters of the Constitution wanted to broaden the protection of the right to picket beyond labour disputes.[26] The right to picket is intricate and complicated, and considering the right to picket in this thesis would detract from the discussion on whether a gathering may lawfully be held on privately owned property. Furthermore, this thesis will not address the right to present petitions, even though it is recognised and protected in section 17 of the Constitution. While presenting petitions may involve entry onto privately owned property, it is doubtful whether mere entry onto privately owned property to present a petition will amount to a deprivation for purposes of section 25(1) of the Constitution. It is also doubtful whether the Gatherings gives effect to the right to picket and present petitions. While the Gatherings Act may be invoked during certain pickets not involving labour disputes, it certainly does not cater for instances in which a petition is to be presented in isolation of a gathering or demonstration.[27]

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[26] S Woolman “Freedom of assembly” in S Woolman & M Chaskalson (eds) *Constitutional law of South Africa* 2 ed (OS 2005) ch 43 25.

[27] Section 3(3)(j) of the Gatherings Act makes provision for the presentation of a petition during the course of a gathering. However, it does not cater for instances where a petition is presented outside the scope of a gathering.

Thirdly, this thesis does not analyse the Gatherings Act in its entirety, but merely the provisions that lead up to a gathering being held on privately owned property. This thesis will thus not consider any provisions relating to conduct and procedures during and after the gathering, as well as conduct and procedures relating to gatherings and demonstrations near courts, buildings of Parliament and the Union Buildings. In this regard, sections 7-16 of the Gatherings Act remain beyond the scope of this thesis.

Fourthly, this thesis does not take into account section 25 of the Constitution as a whole, but merely focuses on section 25(1). The provisions of section 25 dealing with land reform will not be of any use in finding a solution to the research problem.[28] Furthermore, the Gatherings Act does not authorise or permit expropriations. As a result, sections 25(2) and (4) of the Constitution are irrelevant, because no expropriation was authorised, and no just and equitable compensation is thus payable in terms of section 25(3).

Lastly, this thesis refers to the effect the provisions in the Gatherings Act may have on property owners. Despite this, the provisions may have a similar effect on people who have rights or interests in property other than ownership. For example, the effect a gathering may have on property owners would likely have a similar effect on property interest holders such as lessees or servitude holders. Therefore, it should be borne in mind that people with interests in property other than ownership could also be deprived of their property in terms of section 25(1) of the Constitution.

[28] Section 25(5)-(9) of the Constitution contains the land reform provisions.

CHAPTER 2: THE RIGHT TO ASSEMBLE AND DEMONSTRATE: A HISTORICAL ANALYSIS

2 1 Introduction

This thesis seeks to determine whether the Regulation of Gatherings Act 205 of 1993 ("Gatherings Act") permits a deprivation of property in a manner inconsistent with section 25(1) of the Constitution. While one of the main aims of this thesis is to analyse the Gatherings Act, it is important to consider the reasons why such a statute was promulgated. This Act came about as a direct result of the recommendations made by the multinational panel of experts to the Goldstone Commission, which was appointed to investigate political violence between 1991 and 1994.[1] One of these recommendations included the need for new legislation to be enacted to regulate protests that is consistent with the values of the new constitutional dispensation.

This chapter serves to discuss the legislative framework leading to the appointment of the Goldstone Commission, and the subsequent enactment of the Gatherings Act. In doing so, this chapter will highlight the need for the creation of a new regulatory framework for assemblies and demonstrations in South Africa. It will do so, firstly, by discussing the history of the legislative framework of protests in South Africa. This will be examined through the lens of legislation passed to curb resistance against the apartheid regime and the manner in which these statutes were interpreted by courts. Reference will be made to the position before 1950, as well as the position from 1950 until 1993. This discussion will display the manner in which legislation was used to suppress mass political dissent.

Secondly, the right to freedom of assembly in the new constitutional dispensation will be discussed. This will include a description of the right under the Constitution of the Republic of South Africa Act 200 of 1993 ("Interim Constitution"), as well as the impact the submissions made by the multinational panel of experts to the Goldstone Commission had on the drafting of the Gatherings Act. The purpose of the Gatherings Act will also be outlined, with reference to the impact it had on apartheid-era legislation.

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[1] The Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation was appointed by former president FW de Klerk. See further S Woolman "Assembly, demonstration and petition" in I Currie & J de Waal (eds) *The bill of rights handbook* 6 ed (2013) 377 381.

The drafting of the right to assemble and demonstrate in section 17 of the Constitution of the Republic of South Africa, 1996 will also be discussed.

Ultimately, this chapter will aim to set the scene for a concise discussion of the procedures and core definitions in the Gatherings Act. This will provide assistance in determining whether the Gatherings Act permits a deprivation of property in a manner inconsistent with section 25(1) of the Constitution.

2 2 The legislative framework of protests before the new constitutional dispensation

2 2 1 The position prior to 1950

Before the draconian regulation of protests through the enactment of the Suppression of Communism Act 44 of 1950, notions of dissent were mostly regulated by the common law.[2] Under the common law, everyone was entitled to assemble unless it was expressly prohibited or limited by the common law.[3] However, in certain limited circumstances, legislation also regulated protests in relation to specific classes of people or specific situations. As a result, various statutes were passed prior to 1950, which regulated certain aspects of assembly, while the remaining aspects were still regulated by the common law. Furthermore, separate statutes were passed, which regulated assembly for white and black people respectively.[4]

The first and only statute passed to regulate the assembly of white South Africans was the Riotous Assemblies Act 27 of 1914. According to Woolman, this statute granted the government the power to deal with unrest amongst the white working class.[5] Dugard argues that the Riotous Assemblies Act granted the government wide powers to establish a special criminal court to charge workers with the crimes of treason, sedition and public violence.[6] This court typically comprised of two or three

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[2] S Woolman & J de Waal "Voting with your feet" in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and constitutionalism – The new South African legal order* (1994) 292 293.
[3] S Woolman & J de Waal "Voting with your feet" in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and constitutionalism – The new South African legal order* (1994) 292 293.
[4] S Woolman "Freedom of assembly" in S Woolman & M Chaskalson (eds) *Constitutional law of South Africa* 2 ed (OS 2005) ch 43 5.
[5] S Woolman "Freedom of assembly" in S Woolman & M Chaskalson (eds) *Constitutional law of South Africa* 2 ed (OS 2005) ch 43 5.
[6] J Dugard *Human rights and the South African legal order* (1978) 231.

judges from the Supreme Court and, unlike other courts of its time, was not accompanied by a jury.[7]

The first statute enacted to regulate the assembly of black South Africans was the Black Administration Act 38 of 1927. The purpose of this statute was to "provide for the better control and management of native affairs."[8] Section 27(1)(c) granted the Governor-General the power to pass regulations or declare any proclamation on the "prohibition, control or regulation of gatherings or assemblies of Blacks."[9]

2 2 2 The position from 1950 until the end of apartheid

2 2 2 1 Overview

The Suppression of Communism Act 44 of 1950, the Riotous Assemblies Act 17 of 1956, and the Internal Security Act 74 of 1982 were the primary statutes used by state authorities to ban gatherings and assemblies.[10] However, emergency regulations handed down in terms of the Public Safety Act 3 of 1953 also played a role in suppressing political dissent.

2 2 2 2 The role of the Suppression of Communism Act 44 of 1950 in suppressing dissent

The rise of liberation movements such as the African National Congress ("ANC") and the South African Communist Party ("SACP") during the height of segregation, and later apartheid, led to the enactment of the Suppression of Communism Act 44 of 1950 by the National Party ("NP") government.[11] The ANC and SACP were deemed communist parties, and were seen as a threat to the capitalist system advanced by the NP government. This is reflected in the purpose of the Act, which banned the SACP, as well as any other organisation, activity, event or publication that may promote communistic views.[12]

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[7] J Dugard *Human rights and the South African legal order* (1978) 231.

[8] Preamble of the Black Administration Act 38 of 1927.

[9] Section 27(1)(c) of the Black Administration Act 38 of 1927.

[10] *Tsoaeli v S* [2016] ZAFSHC 217 (17 November 2016) para 18.

[11] The Internal Security Act 74 of 1982 was later consolidated to include the Suppression of Communism Act 44 of 1950.

[12] Preamble of the Suppression of Communism Act 44 of 1950.

While the purpose of the Suppression of Communism Act related specifically to the suppression of communist-related activities, the effect of the Act cast the net much wider.[13] The definition of a "communist" in section 1 of the Suppression of Communism Act gave the State President the power to declare anyone a communist.[14] As a result, the provisions of the Act were enforced against those who professed to be communists, as well as those who were not, because the definition of communism was broad enough to include all groups radically opposing the practices of the apartheid government.[15]

Section 9(1) of the Suppression of Communism Act granted the Minister of Justice wide powers to prohibit a gathering if he was of the belief that the objects of communism would be advanced or furthered at such a gathering.[16] This prohibition was only subject to the definition of a "gathering" in section 1(1) of the Suppression of Communism Act,[17] and the gathering having a common purpose.[18] Furthermore, the Minister of Justice could also utilise the opportunity to invoke a prohibition in terms of section 9 of the Suppression of Communism Act on the listed persons in section 5. In terms of this power, he could give notice to a person listed in section 5, prohibiting her from attending and participating in any particular gathering. However, this prohibition

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[13] J Dugard *Human rights and the South African legal order* (1978) 155.

[14] Section 1 of the Suppression of Communism Act 44 of 1950 defined a communist as "a person who professes to be a communist or a person who is deemed by the State President to be one on the ground that he has advocated or is advocating the achievement of any of the objects of communism or any act or omission which is calculated to further the achievement of those objects."

[15] J Dugard *Human rights and the South African legal order* (1978) 155.

[16] Section 9(1) of the Suppression of Communism Act 44 of 1950 stated:

> "Whenever the Minister is satisfied that any person engages in activities which are furthering or are calculated to further the achievement of any of the objects of communism, he may by notice under his hand addressed and delivered or tendered to that person, prohibit him from attending, except in such cases as may be specified in the notice or as the Minister or a magistrate acting in pursuance of his general or special instructions may at any time expressly authorize."

[17] In terms of section 1(1) of the Suppression of Communism Act, a "gathering" refers to "any gathering, concourse or procession in, through or along any place, of any number of persons".

[18] According to AS Mathews *Law, order and liberty in South Africa* (1971) 78-79, this common purpose can be interpreted with reference to its interpretation in criminal law, and requires some objective aside from the act of gathering itself. See further *R v Khan* 1955 3 SA 177 (AD); *R v Lan* 1956 2 SA 246 (AD); *Dudley v Minister of Justice* 1963 2 SA 464 (AD).

was only subject to the definition of a "gathering" in section 1(1), and no common purpose was required.[19]

2 2 2 3 The role of the Riotous Assemblies Act 17 of 1956 in suppressing dissent

Despite the promulgation of the Suppression of Communism Act, anti-apartheid resistance groups embarked on the Defiance Campaign in 1952.[20] As a result, the Criminal Law Amendment Act 8 of 1953 and the Riotous Assemblies Act 17 of 1956 were enacted as a response to the activities of the Defiance Campaign.[21] Both statutes sought to increase criminal sanctions for crimes related to political protest. The purpose of the Riotous Assemblies Act was to consolidate existing laws regarding assemblies, with the aim of strengthening the harmony between "European and non-European inhabitants"[22] of South Africa.[23]

Section 2(1) of the Riotous Assemblies Act granted the magistrate in the particular district the power to prohibit any gathering upon the receipt of a complaint from an interested or affected party. Furthermore, section 2(3) of the Act granted the Minister of Justice the power to prohibit any class of gatherings or to prohibit any person from attending any particular gathering.[24]

In *S v Turrell*,[25] a mass protest was organised by the Student Representatives' Council of the University of Cape Town. The organisers gave notice of their intention to hold the protest via the daily press and through the distribution of pamphlets. The protest was set to commence at St George's Cathedral in Wale Street, Cape Town. Prior to the protest, discussions were held between the organisers of the protest and the police in an attempt to ensure the orderly and peaceful nature of events. However,

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[19] AS Mathews *Law, order and liberty in South Africa* (1971) 80-83.

[20] S Woolman "Assembly, demonstration and petition" in I Currie & J de Waal (eds) *The bill of rights handbook* 6 ed (2013) 377 380.

[21] S Woolman "Assembly, demonstration and petition" in I Currie & J de Waal (eds) *The bill of rights handbook* 6 ed (2013) 377 380.

[22] Preamble of the Riotous Assemblies Act 17 of 1956.

[23] Preamble of the Riotous Assemblies Act 17 of 1956.

[24] Section 2(4)(b) of the Riotous Assemblies Act 17 of 1956 made it an offence to act in contravention of a banning order imposed in terms of section 2(3). According to Molemela JP in *Tsoaeli v S* [2016] ZAFSHC 217 (17 November 2016) para 19, the Minister of Justice had a "wide discretion" in exercising this power. This discretion extended to imposing blanket bans on gatherings for as long as he desired.

[25] 1973 1 SA 248 (C).

a notice prohibiting the demonstration was granted by the magistrate in terms of section 2(1) of the Riotous Assemblies Act. Despite this notice, the Student Representatives' Council continued with the demonstration as planned. As a result of the violation of this notice and the related statutory provision, a number of people were arrested. In its interpretation of this provision, the court made the following remarks:

> "Freedom of speech and freedom of assembly are part of the democratic rights of every citizen of the Republic and Parliament guards these rights jealously for they are part of the very foundations upon which Parliament itself rests. Free assembly is a most important right for it is generally only organised public opinion that carries weight and it is extremely difficult to organise it if there is no right of public assembly. It is against this background that the provisions of the Riotous Assemblies Act must be read."[26]

Despite this remark by the court, it held that the Riotous Assemblies Act "restricts neither the right of free speech nor the right of free assembly".[27] Therefore, the court confirmed the power of the Minister of Justice as being the power to prohibit any gathering. Furthermore, the court held that a magistrate may only prohibit a particular gathering, and not a particular class of gatherings. Instead, the power to prohibit a particular class of gatherings only vested in the Minister of Justice.[28]

In September 1977, the Minister of Justice published a notice in the *Government Gazette* prohibiting all open-air gatherings,[29] except those of a *bona fide* sporting nature. The validity of this notice was contested in *S v Mtutuzeli.*[30] The court held that a notice prohibiting "any gathering" is not *ultra vires* when it only identifies those gatherings excluded from the prohibition.[31] Therefore, the mere exclusion of *bona fide* sporting events from the prohibition did not render the notice invalid.[32]

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[26] *S v Turrell* 1973 1 SA 248 (C) 256.
[27] *S v Turrell* 1973 1 SA 248 (C) 256.
[28] *S v Turrell* 1973 1 SA 248 (C) 256.
[29] *GG* 5758 of 30-09-1977.
[30] 1979 1 SA 764 (T).
[31] *S v Mtutuzeli* 1979 1 SA 764 (T) 766.
[32] *S v Mtutuzeli* 1979 1 SA 764 (T) 766.

Woolman and De Waal are critical of the judiciary's approach to the interpretation of these statutes at a time when political protest was at its peak.[33] Their criticism mainly concerns the failure by judges to acknowledge the circumstances the country found itself in at the time.[34] In this regard, the political climate in which these statues operated was hardly taken into account when the courts were faced with interpreting them.[35] This shows the reluctance by the judiciary to interpret legislation in a manner that would essentially challenge the systematic suppression of mass dissent by the apartheid government.

2 2 2 4 The role of the Internal Security Act 74 of 1982 in suppressing dissent

In order to tighten security legislation, the Rabie Commission was instituted by the government to investigate the reform of the law regulating protests.[36] The Commission presented its report and recommendations in February 1982. The recommendations led to the promulgation of the Internal Security Act 74 of 1982, as well as the Demonstration in or near Court Buildings Act 71 of 1982.[37] The purpose of the Internal Security Act was to provide for measures in upholding the security of the country and maintaining law and order.[38]

Although the Internal Security Act was only one of the statutes enacted to suppress dissent, it was, according to Molemela JP, the "primary legislative tool to restrict political activity and freedom of assembly".[39] Similar to the powers contained in section

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[33] S Woolman & J de Waal "Voting with your feet" in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and constitutionalism – The new South African legal order* (1994) 292 293.
[34] S Woolman & J de Waal "Voting with your feet" in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and constitutionalism – The new South African legal order* (1994) 292 293.
[35] S Woolman & J de Waal "Voting with your feet" in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and constitutionalism – The new South African legal order* (1994) 292 293.
[36] S Woolman & J de Waal "Voting with your feet" in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and constitutionalism – The new South African legal order* (1994) 292 294.
[37] S Woolman & J de Waal "Voting with your feet" in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and constitutionalism – The new South African legal order* (1994) 292 294.
[38] Preamble of the Internal Security Act 74 of 1982.
[39] *Tsoaeli v S* [2016] ZAFSHC 217 (17 November 2016) para 21. In para 22, further reference was made to other statutes that were used to suppress political dissent. These include the Gatherings and Demonstrations in the Vicinity of Parliament Act 52 of 1973, the National Roads Act 54 of 1971 and the Trespass Act 6 of 1959. While Molemela JP briefly outlined the

2 of the Riotous Assemblies Act, wide powers were granted to magistrates in particular regions to prohibit gatherings. Section 46(1) of the Internal Security Act granted magistrates the power to prohibit any gathering in any district, or any particular gathering or class of gathering in a particular district.[40] These powers were wider than those afforded by the Riotous Assemblies Act, and came about as a result of the tendency of local authorities in particular districts to habitually authorise gatherings.[41] This provision thus granted magistrates the power to prohibit gatherings, including those that were otherwise authorised by local authorities.

While this provision displays the powers vested in the magistrate in a particular region, other individuals also had similar powers to prohibit gatherings. For example, section 46(3) of the Internal Security Act granted the Minister of Law and Order the power to prohibit any gathering.[42] In *PG Castel NO v Metal & Allied Workers Union,*[43] the court described the powers of the Minister of Law and Order to prohibit a gathering

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importance of these statutes in para 22, it will not be discussed further in this section of this chapter.

[40] Section 46(1) of the Internal Security Act 74 of 1982 stated:

"Whenever a magistrate has reason to apprehend that the public peace would be seriously endangered–

(a) by any gathering in his district; or

(b) by a particular gathering or any gathering of a particular nature, class or kind at a particular area or wheresoever in his district, he may –

(i) Prohibit for a period not exceeding forty-eight hours every gathering in his district or that particular gathering or any gathering of a particular nature, class or kind at a particular place or in a particular area or everywhere in his district, except in such cases as he may expressly authorize in the prohibition in question or at any time thereafter…"

[41] J Dugard *Human rights and the South African legal order* (1978) 188.

[42] Section 46(3) of the Internal Security Act 74 of 1982 stated:

"(3) The Minister may, if he deems it necessary or expedient in the interest of the security of the State or for the maintenance of the public peace or in order to prevent the causing, encouraging or fomenting of feelings of hostility between different population groups or parts of population groups of the Republic, prohibit in a manner determined in subsection (2)(a)-

(a) any gathering in any area; or

(b) any particular gathering or any gathering of a particular nature, class or kind at a particular place or in a particular area or wheresoever in the Republic, during any period or on any day or during specified times or periods within any period, except in those cases determined in the prohibition in question by the Minister or which the Minister or a magistrate acting in pursuance of the Minister's general or special instructions may at any time expressly authorize."

[43] 1987 4 SA 795 (A).

in terms of section 46(3) as having "no bounds",[44] provided they were exercised in accordance with the guidelines contained in this section. The description by the court of the Minister of Law and Order's powers succinctly indicate the far-reaching powers the government adopted to resist any dissent to the apartheid regime.

2 2 2 5 The role of The Public Safety Act 3 of 1953 in suppressing dissent

The mid-1980s saw the crisis surrounding political protest getting worse.[45] As a result, emergency regulations were handed down by the government in terms of the Public Safety Act 3 of 1953. In terms of these regulations, the respective Divisional Commissioners of Police were granted the power to prohibit gatherings. These regulations were subordinate legislation and thus only required action by an administrator. As a result, courts often focused their attention on the regulations rather than the legislation. For instance, in *United Democratic Front (Western Cape Region) v Van der Westhuizen NO,*[46] the Divisional Commissioner of Police of the Western Cape prohibited a gathering.[47] The Commissioner acted in terms of regulation 7(1) of the regulations made in terms of section 3 of the Public Safety Act. The applicant contended that the prohibition by the Commissioner should be set aside on the grounds that he failed to consider any alternatives to a complete prohibition of the gathering. The applicant argued that the Commissioner should have considered placing conditions on the gathering as planned, instead of prohibiting it outright. The court subsequently granted the application on the grounds that the Commissioner failed to exercise his discretion in terms of the regulation in an objective manner.[48]

In another decision, *During NO v Boesak,*[49] the Divisional Commissioner of Police of the Western Cape appealed against the court *a quo* decision, in which the judge invalidated a notice issued by the Commissioner that sought to prohibit a gathering. The Commissioner had exercised his powers in terms of regulation 10(1)(c) of the

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[44] *PG Castel NO v Metal & Allied Workers Union* 1987 4 SA 795 (A) para 14.

[45] S Woolman "Assembly, demonstration and petition" in I Currie & J de Waal (eds) *The bill of rights handbook* 6 ed (2013) 377 380-381.

[46] 1987 4 SA 926 (C).

[47] *United Democratic Front (Western Cape Region) v Van der Westhuizen NO* 1987 4 SA 926 (C) 927.

[48] *United Democratic Front (Western Cape Region) v Van der Westhuizen NO* 1987 4 SA 926 (C) 932.

[49] 1990 3 SA 661 (A).

emergency regulations made in terms of the Public Safety Act. The gathering in question was a public concert taking place on 17 July 1988 at the University of the Western Cape to celebrate the birthday of then-incarcerated Nelson Mandela. In this particular appeal, the concert organisers alleged that at the time the prohibition was granted, the jurisdictional facts necessary for the Commissioner to exercise his discretion had not yet existed. In the alternative, they argued that the Commissioner's actions were *ultra vires* as he had failed to apply his mind to the criteria necessary for a prohibition to be imposed, as contemplated by section 3(1) of the Public Safety Act. The court disagreed with the respondents, but instead held that the Commissioner had applied his mind when granting the notice to prohibit the gathering. Furthermore, the court agreed with the Commissioner's contention that he was afraid that the gathering would result in violence and stone-throwing and that it was thus necessary for the gathering to be prohibited in order to prevent injury or death.

These two cases display the courts' unwillingness to simply accept the decision by the state to prohibit gatherings. Instead, it shows that the courts were willing to look at the reasons for the administrative decision to prohibit a gathering. Effectively, this allowed the courts to exercise its discretion more freely when cases appeared before it, instead of simply blindly accepting notices that sought to prohibit gatherings. This marked a significant change from the past, as courts were at least willing to consider the political climate of the country when they had to interpret prohibition notices before them.

2 2 2 6 Concluding remarks

The commencement of apartheid in 1948 saw various statutes being passed, which codified many of the segregationist practices in place at the time. The year 1950 was significant as it marked the first major step in regulating assemblies. In *Tsoaeli v S*,[50] Molemela JP stated that during apartheid, magistrates were responsible for approving gatherings, while the police played a major role during the gathering itself.[51] This remark encapsulates the essence of this section, which dealt with the manner in which various bodies implemented the suppression of dissent imposed by the legislative framework from 1950 onward. While the above statement by Molemela JP is simple,

[50] [2016] ZAFSHC 217 (17 November 2016).

[51] *Tsoaeli v S* [2016] ZAFSHC 217 (17 November 2016) para 18.

it reflects the reality that the regulation of protest during and prior to apartheid was far more complex. Various statutes, often referred to as being of a "draconian nature"[52] were enacted to suppress dissent. This dissent was suppressed by state authorities through the prohibition and criminalisation of all forms of mass protest.[53]

Based on the above discussion of the apartheid-era statutes seeking to regulate assembly, and the interpretation of these statutes by courts, a number of conclusions can be drawn. Demonstrations on public property initially required permission by the local authorities, who were "jealous of their powers"[54] and often refused permission for demonstrations to proceed.[55] In this regard, the government at the time amended existing legislation, passed new legislation, or handed down emergency regulations to advance their stance on suppressing mass political dissent.

However, when local authorities started granting permission, legislative measures were put in place that granted magistrates the power to prohibit gatherings.[56] This led to a decline in the number of protests, because magistrates could effectively veto any demonstrations that the local authorities may have permitted.[57] As a result, various forms of mass dissent were a "rarity".[58] The effect of these legislative measures was that local authorities, with the assistance of magistrates, effectively performed the government's functions by carrying out its policies on suppressing political dissent.[59] Effectively, the powers of the judiciary in interpreting these statutes were limited to the confines of the statute itself, and often did not take into account the political climate in which these cases were heard. However, the judiciary was more willing to do so as the magnitude of political protests and violence intensified in the 1980s.

The suppression of mass political dissent, performed through the promulgation of these statutes, as well as the interpretation thereof by the courts, displays the far-reaching impact these apartheid-era statutes had on anti-apartheid movements. It also

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[52] *Tsoaeli v S* [2016] ZAFSHC 217 (17 November 2016) para 24.
[53] *Tsoaeli v S* [2016] ZAFSHC 217 (17 November 2016) para 18.
[54] J Dugard *Human rights and the South African legal order* (1978) 187.
[55] J Dugard *Human rights and the South African legal order* (1978) 187.
[56] J Dugard *Human rights and the South African legal order* (1978) 188.
[57] J Dugard *Human rights and the South African legal order* (1978) 188.
[58] J Dugard *Human rights and the South African legal order* (1978) 186.
[59] J Dugard *Human rights and the South African legal order* (1978) 188.

provides a fruitful understanding of the importance of a new constitutional dispensation given the manner in which mass political dissent was regulated in the past.

2 3 The right to assemble and demonstrate in the new constitutional dispensation

2 3 1 The right to assemble and demonstrate in the Interim Constitution

In February 1990, when FW de Klerk announced that various apartheid-era statutes would be repealed and a number of political prisoners would be released, a new period of South Africa's history was born. The first part of this history was the formulation and adoption of the Interim Constitution.

The Interim Constitution was adopted as a result of the Multi-party Negotiation Process, which commenced in 1993.[60] It was during this process that the text of the Interim Constitution was signed, the framework for the 1996 Constitution was adopted and a binding set of Constitutional Principles were established.[61] The intention was to set out on a two-stage transition process, as agreed upon by various stakeholders at the Conference for a Democratic South Africa ("CODESA").[62] During this period, consensus amongst these stakeholders was reached regarding the need to grant protection to those wishing to exercise their right to freedom of assembly. This position was described by Woolman and De Waal:

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[60] I Currie & J de Waal *The bill of rights handbook* 6 ed (2013) 5; J Brickhill & R Babiuch "Political rights" in S Woolman & M Chaskalson (eds) *Constitutional law of South Africa* 2 ed (OS 2007) ch 45 5; IM Rautenbach "Introduction to the bill of rights" in Y Mokgoro & P Tlakula (eds) *Bill of rights compendium* (RS 2015) ch 1A 11.

[61] I Currie & J de Waal *The bill of rights handbook* 6 ed (2013) 5.

[62] I Currie & J de Waal *The bill of rights handbook* 6 ed (2013) 4. The Constitutional Court in *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 4 SA 744 (CC) para 13 described this process:

> "Instead of an outright transmission of power from the old order to the new, there would be a programmed two-stage transition. An interim government, established and functioning under an interim constitution agreed to by the negotiating parties, would govern the country on a coalition basis while a final constitution was being drafted. A national legislature, elected (directly and indirectly) by universal adult suffrage, would double as the constitution-making body and would draft the new constitution within a given time."

> "For the first time real attempts were made to balance the fundamental rights of protestors, demonstrators, and assemblers against the state's interest in public order, the government's interest in carrying out its tasks, and the general public's liberty interests."[63]

Ultimately, the first indications of the attempt described above can be found in the Interim Constitution.[64] Section 16 of the Interim Constitution, entitled "assembly, demonstration and petition" granted every person the "right to assemble and demonstrate with others peacefully and unarmed, and to present petitions."[65]

2 3 2 The importance of recommendations made to the Goldstone Commission of Inquiry

2 3 2 1 Overview

While section 16 of the Interim Constitution recognised and protected the right to assemble and demonstrate, the Goldstone Commission was appointed to set a framework for legislation giving effect to section 16 of the Interim Constitution, as well as its equivalent in the 1996 Constitution. The Goldstone Commission was assisted by a multinational panel of experts, and together they outlined a new approach towards assembly jurisprudence.[66] The multinational panel of experts also assisted the Goldstone Commission in drafting new legislation based on this approach.[67] The result was the enactment of the Gatherings Act, which repealed legislation enacted under the apartheid regime that sought to prohibit gatherings.[68] The multinational panel's approach was premised on the idea that public demonstration, whether it be in support of, or in opposition to state policies or government leaders, is an integral part of a democratic society.[69]

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[63] S Woolman & J de Waal "Voting with your feet" in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and constitutionalism – The new South African legal order* (1994) 292 294.
[64] The Constitution of the Republic of South Africa Act 200 of 1993.
[65] Section 16 of the Constitution of the Republic of South Africa Act 200 of 1993.
[66] S Woolman "Freedom of assembly" in S Woolman & M Chaskalson (eds) *Constitutional law of South Africa* 2 ed (OS 2005) ch 43 7.
[67] S Woolman "Freedom of assembly" in S Woolman & M Chaskalson (eds) *Constitutional law of South Africa* 2 ed (OS 2005) ch 43 7.
[68] The specific statutes repealed will be discussed in 2 3 3.
[69] P Heymann *Towards peaceful protests in South Africa* (1992) 1. This source contains the recommendations the multinational panel made to the Goldstone Commission.

Based on this principle, the multinational panel made numerous recommendations to the Goldstone Commission relating to the need for a new legislative framework for the regulation and protection of the right to assemble and demonstrate. It also made various recommendations about the content of the new legislative framework. These recommendations will be discussed in light of the requirements for a lawful gathering in sections 2, 3 and 4 of the Gatherings Act. The requirements for a lawful gathering are a direct result of the recommendations made by the multinational panel. This will impact the discussion in chapter three, which will address the procedures to be followed before a lawful gathering in terms of the Gatherings Act may be held.

2 3 2 2 Notice of a gathering

One of the major recommendations made by the multinational panel related to notice, namely that the relevant authorities must be notified of a gathering before its commencement.[70] The multinational panel recommended that those who intend to hold a demonstration should simply be required to give notice to the necessary authorities before the commencement thereof.[71] It stated that the best functionary or authority to give notice of a demonstration to would be the local government authority, because it is best equipped to make the necessary arrangements prior to the commencement of a demonstration.[72] In its recommendations to the Goldstone

[70] P Heymann *Towards peaceful protests in South Africa* (1992) 10.

[71] According to the multinational panel, the notice requirement emphasised the fact that any right to assemble or demonstrate is not dependent on authorisation or permission at the peril of local authorities. Instead, this requirement only granted the authorities the power to enforce measures to restrict the effect that the demonstration may have on the public. This symbolised the fact that a mere failure to follow the necessary procedures before an assembly or demonstration does "*not* necessarily require some forceful action". As a result, any restrictions imposed on the demonstration by the local authorities that sought to limit the effect on the public could be challenged before a court of law. Therefore, the knowledge of the existence of a remedy would encourage organisers and authorities to negotiate the terms and logistics of the demonstration. See further P Heymann *Towards peaceful protests in South Africa* (1992) 10.

[72] This recommendation was made despite the fact that many believed that this authority would either be unsympathetic towards those who wish to organise or participate in a demonstration or that the authority would be biased towards certain parties or organisations. The multinational panel, however, found that any concerns could be debunked should a copy of the notice be given to the South African Police, which would subsequently play a large role in

Commission, the multinational panel suggested that six working days' notice should be sufficient for local authorities to arrange and hold meetings with all interested parties, to ensure the location and logistics have been arranged, and to prepare for the demonstration itself.[73]

The multinational panel recognised that certain events may take place that will trigger an instantaneous reaction by members of a particular community.[74] This reaction will often result in a spontaneous demonstration, in which the notice requirement could be bypassed.[75] It is universally accepted that these types of demonstrations are not formally organised through appointed organisers, which would typically be those who would be held responsible.[76] These specific types of demonstrations do not have to be dealt with in a violent manner by the police.[77] Instead, the past actions of the police in similar situations have shown that they are capable of dealing with demonstrations without notice in a non-violent manner.[78] Therefore, mere failure to give notice of a gathering should not warrant a violent reaction by the police.

2 3 2 3 Negotiations before a gathering

The multinational panel emphasised the importance of holding negotiations between local authorities, organisers and the police.[79] This will ensure that the

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the negotiation process. See further P Heymann *Towards peaceful protests in South Africa* (1992) 10-11.

[73] This should also give organisers sufficient time to have any restrictions challenged in court and to inform participants of the conditions under which the demonstration would take place. The multinational panel also stated that failure by the local authority to act in terms of the notice should amount to an automatic acceptance of the content of the notice. See further P Heymann *Towards peaceful protests in South Africa* (1992) 12-13.

[74] P Heymann *Towards peaceful protests in South Africa* (1992) 13.

[75] P Heymann *Towards peaceful protests in South Africa* (1992) 13.

[76] P Heymann *Towards peaceful protests in South Africa* (1992) 13.

[77] P Heymann *Towards peaceful protests in South Africa* (1992) 13.

[78] The multinational panel recommended that mere failure to provide the necessary notice should not immediately mean that steps should be taken for the demonstration to be prevented, as it merely amounts to an inconvenience. Instead, the authorities should try and accommodate the needs of the demonstrators, while keeping the needs of other members of the public in mind. See further P Heymann *Towards peaceful protests in South Africa* (1992) 13.

[79] P Heymann *Towards peaceful protests in South Africa* (1992) 14.

demonstrators' message is heard, while causing as little disruption for members of the public as possible.[80] The panel maintained that it is the responsibility of the local authority concerned to arrange the meeting between all stakeholders.[81] The procedures followed by the local authorities during this stage should be made clear and published so that it is accessible to the public.[82] The multinational panel recommended to the Goldstone Commission that the role of local authorities and the police should be viewed to "facilitate and protect"[83] demonstrations, even in cases where the police or the local authorities are the target of the demonstration itself.[84]

The multinational panel suggested that inviting private parties to attend these negotiations could assist in the process being free from bias.[85] This negotiation process thus sought to place the responsibility of the course of the demonstration in more than one set of hands.[86] This would grant the organisers of the demonstration a greater sense of protection should the local authorities attempt to place a restriction on a demonstration that the police were otherwise willing to accommodate.[87]

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[80] P Heymann *Towards peaceful protests in South Africa* (1992) 13.

[81] P Heymann *Towards peaceful protests in South Africa* (1992) 13.

[82] P Heymann *Towards peaceful protests in South Africa* (1992) 13.

[83] P Heymann *Towards peaceful protests in South Africa* (1992) 14.

[84] In this regard, it is essential for these parties to negotiate in good faith in order to ensure that the local authorities and the police can provide "fair and effective" assistance to all those participating in the demonstration. Apart from acting in good faith, the multinational panel advised that the local authorities and the police participate in the negotiation process enthusiastically. This would ensure that organisers would be more satisfied with the negotiation process and would thus be more willing to accept any conditions imposed on the demonstration. It is essential that the organisers are satisfied with the process, as it would be easier for the organisers (and their marshals) to prevent the destruction or property and injuries during the course of the demonstration than it would be for the police. It would also be easier for the marshals to ensure that any restrictions or conditions are complied with, and that the procession is kept in check without resorting to violence. See further P Heymann *Towards peaceful protests in South Africa* (1992) 14-15.

[85] P Heymann *Towards peaceful protests in South Africa* (1992) 11.

[86] P Heymann *Towards peaceful protests in South Africa* (1992) 11.

[87] P Heymann *Towards peaceful protests in South Africa* (1992) 11.

2 3 3 The promulgation of the Regulation of Gatherings Act 205 of 1993

The recommendations made by multinational panel to the Goldstone Commission brought about the promulgation of the Gatherings Act.[88] The purpose of the Gatherings Act is "[t]o regulate the holding of public gatherings and demonstrations at certain places; and to provide for matters connected therewith."[89] The purpose of the Gatherings Act thus defines, and subsequently limits, the regulatory nature of the Act itself. It does so, firstly, by limiting its scope to "public gatherings and demonstrations". Secondly, it limits the types of property to which the Act extends by referring to "certain places".

The Gatherings Act also sought to repeal various apartheid-era statutes, including the Gatherings and Demonstrations in the Vicinity of Parliament Act 52 of 1973, the Demonstrations in or near Court Buildings Prohibition Act 71 of 1982, and the Gatherings and Demonstrations at or near the Union Buildings Act 103 of 1992 in its entirety.[90] The Gatherings Act also repealed various sections of the Internal Security Act 74 of 1982.[91]

According to a policy document issued by the Ministry of Police, entitled "Policy and guidelines: Policing of public protests, gatherings and major events" ("Policy document on public protests"),[92] the basic premise of the Gatherings Act is that everyone has a right to partake in gatherings peacefully, and thus deserve the protection of the South African Police Services.[93] The Policy document on public protests also states that the Gatherings Act sets out the key individuals involved in making submissions before a request to hold a gathering may be approved,[94] as well as the procedures that certain

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[88] S Woolman "Assembly, demonstration and petition" in I Currie & J de Waal (eds) *The bill of rights handbook* 6 ed (2013) 377 381.

[89] The Regulation of Gatherings Act 205 of 1993.

[90] Schedule 3 of the Regulation of Gatherings Act 205 of 1993. See also The Ministry of Police *Policy and guidelines: Policing of public protests, gatherings and major events* (2011) 6.

[91] The Regulation of Gatherings Act 205 of 1993 repealed sections 46(1) and (2), 47, 48, 49, 51, 53, 62 and 75 of the Internal Security Act 74 of 1982. See also The Ministry of Police *Policy and guidelines: Policing of public protests, gatherings and major events* (2011) 6.

[92] The Ministry of Police *Policy and guidelines: Policing of public protests, gatherings and major events* (2011).

[93] The Ministry of Police *Policy and guidelines: Policing of public protests, gatherings and major events* (2011) 6.

[94] The Ministry of Police *Policy and guidelines: Policing of public protests, gatherings and major events* (2011) 7.

individuals need to follow before a gathering may commence.[95] These procedures will be addressed in detail in chapter three.

2 3 4 The right to assemble and demonstrate in terms of the Constitution of the Republic of South Africa, 1996

The protection of the right to freedom of assembly in terms of the Interim Constitution was replaced by section 17 of the 1996 Constitution. Even though the Gatherings Act was enacted to give effect to section 16 of the Interim Constitution, it is the only statute that deals with the procedures surrounding the exercise of rights in section 17 of the Constitution, and can thus be viewed to give effect to section 17 as such.

The drafting of the right to assemble, demonstrate, picket and present petitions, was performed by the Constitutional Assembly.[96] The task of the Constitutional Assembly was to draft the wording of the right to freedom of assembly, while giving effect to Constitutional Principle II.[97] The process involved the consideration of submissions made by political parties, government structures and institutions, organisations and the public at large.

The Constitutional Assembly Theme Committee 4 on fundamental rights (Freedom of assembly, demonstration and petition) ("The Committee") was tasked with drafting the provisional text of section 17, while taking the views of political parties and other stakeholders into account. It found that the nature of the right should not only include the right to assemble, demonstrate and picket, but should also extend to the right to present petitions.[98] Internal modifiers were included that required these rights to be

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[95] The Ministry of Police *Policy and guidelines: Policing of public protests, gatherings and major events* (2011) 6-7.

[96] I Currie & J de Waal *The bill of rights handbook* 6 ed (2013) 6. Section 68(1) of the Interim Constitution stated that the Constitutional Assembly would comprise of the joint sitting of the National Assembly and the Senate, which included the members of Parliament elected during the 1994 elections.

[97] Constitutional Principle II states:

> "Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution."

[98] While all interested parties agreed that the right to freedom of assembly and demonstration are universally accepted as being fundamental rights, they disagreed on the inclusion of the

exercised peacefully and unarmed.[99] With regard to the application of the right, the Committee was of the opinion that the state, as well as private actors,[100] had a duty to "respect and protect the exercise of the rights."[101] Natural persons were found to be bearers of the right, as well as juristic persons, despite some reservations by certain interested parties.[102] The Committee also indicated that the right could be limited in

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right to petition. Not only did the Freedom Front Plus submit that this right should not be included in the same section as the right to assemble and demonstrate, but they also maintained that this right is not fundamental and should thus be omitted from the Constitution in its entirety. Their argument was based on the fact that this right is not recognised in international instruments and agreements, and is omitted in the constitutions of other nations. Their views were also based on the fact that its inclusion would create the impression that those to whom the petition is addressed is compelled to meet the demands contained therein. However, the Committee noted that including the right to petition alongside the right to assemble and demonstrate would not detract from the protection of the right to petition outside the context of an assembly or demonstration. The report also indicated that mere inclusion of this right in the Constitution should not be interpreted to compel those to whom the petitions are addressed to comply with the contents thereof. See further Constitutional Assembly Theme Committee 4 report on fundamental rights "Freedom of assembly, demonstration and petition" (1995) 6. The importance of the inclusion of the right to petition was summarised by L du Plessis & H Corder *Understanding South Africa's transitional bill of rights* (1994) 160:

> "While some might regard the right to petition as somewhat archaic, its importance historically as a means of registering grievances seems to have diminished little in present circumstances."

[99] All interested parties agreed that the recognition of the right is necessary for the functioning of a constitutional democracy, but admitted that this right needs to be exercised peacefully and unarmed. See further Constitutional Assembly Theme Committee 4 report on fundamental rights "Freedom of assembly, demonstration and petition" (1995) 6.

[100] Along with this duty, the Committee also agreed that the right must apply to customary law and the common law. See further Constitutional Assembly Theme Committee 4 report on fundamental rights "Freedom of assembly, demonstration and petition" (1995) 6-7, 12.

[101] Constitutional Assembly Theme Committee 4 report on fundamental rights "Freedom of assembly, demonstration and petition" (1995) 6.

[102] While all interested parties agreed that natural persons would be bearers of the right, three political parties (the African Christian Democratic Party, the Democratic Party and the National Party) argued that the right should extend to juristic persons. The Committee noted the argument, but stated that it would only be taken into account when the Memorandum on the general application of the Bill of Rights is drafted. This Memorandum subsequently led to the adoption of section 8 of the Constitution, which extended the rights in the Bill of Rights to juristic persons. Section 8(4) states that "[a] juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person." See further Constitutional Assembly Theme Committee 4 report on fundamental rights "Freedom of assembly, demonstration and petition" (1995) 7, 12.

terms of a general limitations clause,[103] and that it could only be suspended during a state of emergency, provided it occurred under judicially-controlled circumstances.[104] As a result of the Committee's findings, it agreed upon a provisional text for section 17 of the Constitution, subject to the approval of the Constitutional Assembly. This text was subsequently amended by the Constitutional Assembly, and the final text of section 17 of the Constitution thus read:

> "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."[105]

The wording of section 17 makes it clear that some assemblies, demonstrations, pickets and petitions will fall outside the scope of the protection afforded by section 17.[106] It includes assemblies, demonstration, pickets and petitions that overstep the "boundary set by the Constitution",[107] which requires that they be exercised "peacefully and unarmed". These terms thus serves as an internal modifier of the right in section 17 of the Constitution.[108] Rautenbach argues that had these internal modifiers been omitted from section 17, participants in non-peaceful or armed assemblies, demonstrations and pickets would still not enjoy constitutional protection.[109] Instead, the participants' rights in section 17 of the Constitution could be justifiably limited in

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[103] Further contention was present in agreeing upon the limitation of the right. While there was agreement about the fact that the right could be limited, the nature and extent of the limitation was contentious. See Constitutional Assembly Theme Committee 4 report on fundamental rights "Freedom of assembly, demonstration and petition" (1995) 7, 12.

[104] This specific issue was raised by the African National Congress. The Committee found that the position of the right during a state of emergency was covered by section 34 of the Interim Constitution. See further Constitutional Assembly Theme Committee 4 report on fundamental rights "Freedom of assembly, demonstration and petition" (1995) 8, 12.

[105] Section 17 of the Constitution of the Republic of South Africa, 1996.

[106] S Woolman "Assembly, demonstration and petition" in I Currie & J de Waal (eds) *The bill of rights handbook* 6 ed (2013) 377 383.

[107] *Hotz v UCT* 2016 4 All SA 723 (SCA) para 31.

[108] S Woolman "Freedom of assembly" in S Woolman & M Chaskalson (eds) *Constitutional law of South Africa* 2 ed (OS 2005) ch 43 19.

[109] IM Rautenbach "Introduction to the bill of rights" in Y Mokgoro & P Tlakula (eds) *Bill of rights compendium* (RS 2015) ch 1A 171.

terms of section 36(1) of the Constitution,[110] due to the non-peaceful or armed manner in which the right was exercised.

Gatherings will not be peaceful in cases where public or private interests, such as public order, injury to persons, and damage to property, are threatened by violent action.[111] A useful example of such action was seen in *Fourways Mall (Pty) Ltd v South African Commercial Catering*.[112] While commenting on the conduct of the respondent, the court held that neither the Labour Relations Act 66 of 1995, nor section 17 of the Constitution, can be used to protect picketers where acts of intimidation are used to target members of the public and subsequently interfere with the rights of other lessees in a shopping mall. This shows that the section 17 internal modifier refers not only to violent acts, but also structurally violent acts such as intimidation.

A further internal modifier states that the right in section 17 be exercised "unarmed". This means that participants of an assembly, demonstration, picket or petition carrying arms will be excluded from the protection afforded by section 17 of the Constitution.[113]

2 4 Conclusion

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[110] IM Rautenbach "Introduction to the bill of rights" in Y Mokgoro & P Tlakula (eds) *Bill of rights compendium* (RS 2015) ch 1A 171.

[111] IM Rautenbach "Introduction to the bill of rights" in Y Mokgoro & P Tlakula (eds) *Bill of rights compendium* (RS 2015) ch 1A 171.

[112] 1999 3 SA 752 (W). This case dealt with a dispute between two trade unions (the respondents) and two separate owners and lessors of two separate shopping malls (the applicants). The applicants sought an order confirming an interim order granted against the respondents that prohibited them from blocking the shopping centre entrances, impeding the movement of members of the public and intimidating members of the public, employees and other lessees. The respondents had been on the premises of the applicant as part of a protected strike. The strike was conducted against Edgars Stores Limited, one of the lessees at the respective shopping malls. An earlier order of the Labour Court forbade members of the respondent from interfering with the customers and employees of Edgars Stores Limited. The same order placed a burden on the respondents to negotiate with the applicants about the logistics of the picket or demonstration on the applicant's property, before such action commenced. As a result, the applicants sought urgent relief preventing the respondents from conducting themselves in the manner mentioned above.

[113] S Woolman "Freedom of assembly" in S Woolman & M Chaskalson (eds) *Constitutional law of South Africa* 2 ed (OS 2005) ch 43 20; S Woolman "Assembly, demonstration and petition" in I Currie & J de Waal (eds) *The bill of rights handbook* 6 ed (2013) 377 385.

This chapter served to discuss the legislative and constitutional framework of the right to assemble and demonstrate before, during and after apartheid. This was done, firstly, by analysing the history of protests during apartheid. Reference was made to various statutes, as well as the manner in which these statutes were interpreted by courts. The discussion of these statutes and cases displayed heavy attempts by the government to curb any form of dissent. It was found that magistrates, ministers and other authorities used the legislative framework at the time to prohibit gatherings. However, from the 1980s, the judiciary was more willing to take the political context at the time into account when interpreting these statutes.

Secondly, the position of the right to assemble and demonstrate in the new constitutional dispensation was analysed. This included a discussion of the right under the Interim Constitution, which recognised and protected the right to assemble, demonstrate and present petitions. The submissions made by the multinational panel of experts to the Goldstone Commission regarding notice and negotiations before a gathering, aided in drafting provisions of the Gatherings Act. The Act was found to give effect to section 16 of the Interim Constitution, and repealed apartheid-era statutes that sought to prohibit gatherings outright. The drafting of the 1996 Constitution was subject to a tedious drafting process, which saw submissions from various stakeholders being made on what should form part of the recognition of the right to freedom of assembly. The result of this process was section 17 of the Constitution, which recognises the right to assemble, demonstrate, picket and present petitions.

The Gatherings Act encourages and regulates assemblies and demonstrations, rather than prohibits it in a manner consistent with its predecessors. In this regard, this chapter ultimately set out to provide a useful basis to discuss the content of the Gatherings Act.

CHAPTER 3: "GATHERING" IN TERMS OF THE REGULATION OF GATHERINGS ACT 205 OF 1993

3 1 Introduction

While the previous chapter discussed the legislative and constitutional framework of the right to assemble and demonstrate before and during the new constitutional dispensation, this chapter will focus on the definition of a gathering and the requirements for a lawful gathering in terms of the Regulation of Gatherings Act 205 of 1993 ("Gatherings Act"). This will be done, firstly, by briefly outlining and interpreting the definition of a "gathering". Reference will also be made to the differences between a "gathering" and "demonstration" in terms of the Gatherings Act.

Secondly, the requirements for conducting a lawful gathering will be discussed. This discussion will focus on sections 2, 3 and 4 of the Gatherings Act, which deal with the procedures that need to be followed before the commencement of a gathering. A discussion of the impact a gathering may have on rights protected in section 25(1) of the Constitution of the Republic of South Africa, 1996, require that these requirements are met.

Thirdly, the types of property to which the definition of a "gathering" extends will be determined. In this regard, emphasis will be placed on whether the Gatherings Act applies to privately owned property and, if so, in which circumstances. This discussion will focus on the concepts of "public road", "any other public place or premises" and "wholly or partly open to the air", which form part of the definition of a "gathering". This determination will be made with reference to legislation, academic commentary and case law.

Ultimately, this chapter will seek to draw conclusions on the circumstances in which the Gatherings Act may apply to privately owned property. This will provide a useful basis for discussing the impact the Gatherings Act may have on section 25(1) of the Constitution, which will be discussed in chapter 4. If it is found that the Gatherings Act applies to privately owned property, then chapter 4 will need to address whether the Act permits a deprivation of property in a manner inconsistent with section 25(1) of the Constitution.

3 2 Requirements for holding a lawful gathering in terms of the Gatherings Act

3 2 1 Overview

The Gatherings Act makes provision for procedures to be followed before a gathering may commence, which applies only to a gathering, and not a demonstration.[1] In section 1 of the Gatherings Act, a distinction is made between a "gathering" and a "demonstration". Section 1 defines a demonstration as "any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action."[2] Demonstrations need to be distinguished from gatherings because they do not attract the "strictures"[3] of a gathering,[4] and can thus bypass the procedural requirements in sections 2, 3 and 4 of the Gatherings Act. Section 1 of the Gatherings Act defines a "gathering":

> "'[G]athering' means any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 1989 (Act No. 29 of 1989), or any other public place or premises wholly or partly open to the air-
>
> *(a)* at which the principles, policy, actions or failure to act of any government, political party or political organization, whether or not that party or organization is registered in terms of any applicable law, are discussed, attacked, criticized, promoted or propagated; or
>
> *(b)* held to form pressure groups, to hand over petitions to any person, or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution."[5]

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[1] The only other mention of a demonstration relates to demonstrations in the vicinity of courts, Parliament and the Union Buildings in section 7 of the Gatherings Act (which is beyond the scope of this thesis), and other issues related to the course of a demonstration (which is beyond the scope of this thesis).

[2] Section 1 of the Regulation of Gatherings Act 205 of 1993.

[3] S Wilson & I de Vos in *Ex Parte: Council for the Advancement of the South African Constitution In Re: Restraint of protest on or near university campuses* Chambers, Johannesburg (22 December 2016) para 33.

[4] S Wilson & I de Vos in *Ex Parte: Council for the Advancement of the South African Constitution In Re: Restraint of protest on or near university campuses* Chambers, Johannesburg (22 December 2016) para 33.

[5] Section 1 of the Regulation of Gatherings Act 205 of 1993.

The above definition of a gathering refers to "any assembly". Woolman argues that assemblies are "gatherings that may or may not have political content."[6] This raises concern, because his definition includes the term "gathering", while the definition of a "gathering" in the Gatherings Act includes an "assembly" as a subset, or type of gathering. In other words, the Gatherings Act classifies an assembly as a type of gathering, while Woolman classifies a gathering as a type of assembly. Even though this thesis does not aim to clarify any of the confusion in these definitions, highlighting this issue displays the various ways in which these terms could be interpreted. The remainder of the definition of a "gathering" is fairly straightforward, either because certain terms can be understood within their ordinary meaning, or are defined elsewhere in the Gatherings Act or another statute.[7]

3 2 2 Section 2 of the Gatherings Act: The appointment of conveners, authorised members and responsible officers

The first requirement for conducting a lawful gathering relates to the appointment of persons involved in the procedures to be followed under the Gatherings Act. Section 2 of the Gatherings Act enlists the procedures to be followed regarding the appointment of conveners,[8] authorised members,[9] and responsible officers.[10] These

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[6] S Woolman "Assembly, demonstration and petition" in I Currie & J de Waal (eds) *The bill of rights handbook* 6 ed (2013) 377 386.

[7] The definition of a gathering contains reference to an organisation, which is defined in section 1 of the Gatherings Act as "any association, group or body of persons, whether or not such association, group or body has been incorporated, established or registered in accordance with any law." Furthermore, reference is made to the definition of a public road, as defined in the Road Traffic Act 29 of 1989. This definition will be discussed later in this chapter.

[8] Section 1 of the Regulation of Gatherings Act defines "convener":

> "'[C]onvener' means –
>
> *(a)* any person who, of his own accord, convenes a gathering;
>
> *(b)* in relation to any organization or branch of any organization, any person appointed by such organization or branch in terms of section 2 (1)."

[9] Section 1 of the Regulation of Gatherings Act 205 of 1993 defines "authorised member" as "a member of the Police authorized in terms of section 2 (2) to represent the Police as contemplated in the said section."

[10] Section 1 of the Regulation of Gatherings Act 205 of 1993 defines "responsible officer" as "a person appointed in terms of section 2 (4) *(a)* as responsible officer or deputy responsible officer, and includes any person deemed in terms of section 2 (4) *(b)* to be a responsible officer."

three parties are essential to the negotiations and organisation of the gathering before it commences.

3 2 3 Section 3 of the Gatherings Act: Granting notice of a gathering

The second requirement for conducting a lawful gathering relates to notice.[11] Section 3 of the Gatherings Act enlists the procedures regarding the granting and receiving of notice of a gathering, the contents of such notice and the duties of the local authorities, responsible officer, convener and authorised member. Section 3(1) of the Gatherings Act requires the convener to give written notice of the intended gathering to the responsible officer concerned. Section 3(2) requires that this notice be given at least seven days before the gathering. Section 3(2), however, makes provision for the fact that seven days' notice may not be desirable, and allows the notice to be given at the earliest opportunity possible. In such cases, however, section 3(2) grants the responsible officer the power to prohibit the gathering if notice is given less than 48 hours beforehand.

This provision clearly displays the impact that the recommendations of the multinational panel had on the drafting of the Gatherings Act.[12] Despite the impact of the recommendations of the multinational panel on the above provision, Woolman is critical thereof.[13] He argues that the seven day notice period creates "doctrinal problems and practical difficulties."[14] This notice period does not take into account the possibility that gatherings are often an immediate response by a segment of the population to some form of injustice or wrongdoing.[15] Therefore, it has the effect of suppressing immediate dissent by allowing the state an opportunity to counteract any intended gatherings before they can actually commence.[16]

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[11] See also 2 3 2 2 above.

[12] See 2 3 2 2 above. The remainder of section 3 of the Gatherings Act is beyond the scope of this thesis.

[13] S Woolman "Freedom of assembly" in S Woolman & M Chaskalson (eds) *Constitutional law of South Africa* 2 ed (OS 2005) ch 43 8.

[14] S Woolman "Freedom of assembly" in S Woolman & M Chaskalson (eds) *Constitutional law of South Africa* 2 ed (OS 2005) ch 43 8.

[15] S Woolman "Freedom of assembly" in S Woolman & M Chaskalson (eds) *Constitutional law of South Africa* 2 ed (OS 2005) ch 43 8.

[16] S Woolman "Freedom of assembly" in S Woolman & M Chaskalson (eds) *Constitutional law of South Africa* 2 ed (OS 2005) ch 43 9.

3 2 4 Section 4 of the Gatherings Act: Other miscellaneous procedures before a gathering

The final requirement for the organisation of a lawful gathering relates to the remainder of the procedures between various affected parties. Section 4 of the Gatherings Act enlists the procedures relating to consultations and negotiations between all relevant stakeholders,[17] the amendment of notices by the convener, and any conditions placed on the gathering related to logistics, time periods, and the behaviour of participants.

The importance of holding meetings in terms of section 4 of the Gatherings Act could also be explained by referring to other sections of the Gatherings Act. According to the Policy document on public protests,[18] the responsibility of conveners or organisers to hold a meeting in terms of section 4 prior to such gathering could aid in avoiding prosecution in terms of section 12 of the Gatherings Act.[19] The document states that to ensure that section 12 of the Gatherings Act is "effectively utilized",[20] the outcomes of these meetings should result in strict conditions being placed on the approval of the intended gathering.[21] This meeting needs to address issues such as the route of the gathering, the amount of marshals to be used, the number of participants and any other conditions to be imposed on the gathering itself.[22]

The Policy document on public protests emphasises that the responsibility of organising and executing a successful gathering under the Gatherings Act does not solely lie in the South African Police Services.[23] Instead, the South African Police Services is simply there to protect those who are exercising their right to peacefully

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[17] See also 2 3 2 3 above.

[18] The Ministry of Police *Policy and guidelines: Policing of public protests, gatherings and major events* (2011).

[19] The Ministry of Police *Policy and guidelines: Policing of public protests, gatherings and major events* (2011) 25.

[20] The Ministry of Police *Policy and guidelines: Policing of public protests, gatherings and major events* (2011) 25.

[21] The Ministry of Police *Policy and guidelines: Policing of public protests, gatherings and major events* (2011) 25.

[22] The Ministry of Police *Policy and guidelines: Policing of public protests, gatherings and major events* (2011) 19.

[23] The Ministry of Police *Policy and guidelines: Policing of public protests, gatherings and major events* (2011) 13.

participate in the gathering,[24] while organisers and conveners are tasked with ensuring that the gathering remains peaceful, and proceeds according to the route and guidelines decided upon at the meeting.[25]

Woolman argues that section 5(2) of the Gatherings Act grants the local authorities a "significant degree of discretion"[26] in determining whether the gathering should be prohibited, provided they have organised a meeting with the conveners and other affected parties within 24 hours of the notice being granted.[27] He is critical of the role of local authorities, and how they have failed to meet their constitutional obligations, as well as their obligations under the Gatherings Act.[28]

3 3 Privately owned property affected by a "gathering" in terms of the Gatherings Act

3 3 1 Overview

The Gatherings Act limits the application of the Act to "certain places". These places are gatherings that are held "[i]n or on any public road as defined in the Road Traffic Act, 1989 (Act 29 of 1989), or any other public place or premises wholly or partly open to the air".[29]

This section will determine whether the definition of a gathering extends to privately owned property, and, if so, in which circumstances. This will be determined with

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[24] The Ministry of Police *Policy and guidelines: Policing of public protests, gatherings and major events* (2011) 6.

[25] The Ministry of Police *Policy and guidelines: Policing of public protests, gatherings and major events* (2011) 13.

[26] S Woolman "Freedom of assembly" in S Woolman & M Chaskalson (eds) *Constitutional law of South Africa* 2 ed (OS 2005) ch 43 10.

[27] This meeting is one of the procedures required by section 4(3) of the Regulation of Gatherings Act 205 of 1993.

[28] S Woolman "Freedom of assembly" in S Woolman & M Chaskalson (eds) *Constitutional law of South Africa* 2 ed (OS 2005) ch 43 9-11 argues that this failure includes the failure by local authorities to reply to a notice within the required 24-hour period in terms of section 4(3) of the Gatherings Act. This also includes the failure by local authorities to discuss amendments to the notice as well as conditions to be placed on the gathering with responsible officers and members of South African Police Services, as required in terms of section 4(2)(b) of the Gatherings Act. He also argues that responsible officers often fail in negotiating conditions with organisers, and have instead resorted to prohibiting gatherings outright.

[29] Section 1 of the Regulation of Gatherings Act 205 of 1993.

reference to the definitions of a “public road”, “any other public place or premises” and “wholly or partly open to the air” respectively.

3 3 2 “Public road” for the purposes of the definition of a gathering

Section 1 of the Gatherings Act states that a gathering could occur “in or on any public road as defined in the Road Traffic Act, 1989 (Act 29 of 1989)”. However, the Road Traffic Act 29 of 1989 referred to in the definition of a gathering was repealed by the National Road Traffic Act 93 of 1996. Therefore, the definition of a “public road” in section 1 of the National Road Traffic Act is the only definition that could be used to determine what constitutes a “public road” for the purpose of the definition of a gathering in the Gatherings Act. Section 1 of the National Road Traffic Act defines a “public road”:

> “‘[P]ublic road’ means any road, street or thoroughfare or any other place (whether a thoroughfare or not) which is commonly used by the public or any section thereof or to which the public or any section thereof has a right of access, and includes -
>
> (a) the verge of any such road, street or thoroughfare;
>
> (b) any bridge, ferry or drift traversed by any such road, street or thoroughfare; and
>
> (c) any other work or object forming part of or connected with or belonging to such road, street or thoroughfare.”[30]

Based on this definition, gatherings on a “public road” are limited to public roads as defined by the National Road Traffic Act. Any other gatherings, which fall outside the scope of the definition above, will either not qualify as a “gathering” for the purposes of the Gatherings Act or will fall under the definition of “any other public place or premises wholly or partly open to the air”.[31] This definition offers little scope in extending the definition of a “public road” to privately owned property, and will not be discussed further as such.

[30] Section 1 of the National Road Traffic Act 93 of 1996.

[31] Section 1 of the Regulation of Gatherings Act 205 of 1993.

3 3 3 "Any other public place or premises" in terms of section 1 of the Gatherings Act

3 3 3 1 Overview

In order to determine whether the definition of a gathering extends to privately owned property, it is necessary to formulate an understanding of the term "any other public place or premises". This phrase is central to the definition of a gathering in section 1 of the Gatherings Act, and the procedures contained in the Act are thus dependent on this part of the definition of a gathering being met.

The term "any other public place or premises" does not expressly require that the place or premises be publicly owned or state owned, but merely that it be public. According to Layard, public ownership is not a prerequisite for property to be considered "public".[32] Furthermore, McLean argues that publicly owned property does not always amount to a public place.[33] This means that privately owned places and premises could qualify as "public", and publicly owned places do not necessarily qualify as "public".

3 3 3 2 Lessons from the Riotous Assemblies Act 17 of 1956

The easiest manner in which to find an interpretation for "any other public place or premises" could be to determine whether similar wording was used in apartheid-era statues.[34] Although the Riotous Assemblies Act sought to suppress forms of dissent, and thus contrasts with the purpose of the Gatherings Act, which seeks to regulate and protect assembly, reference to the apartheid-era statute provides useful guidance.

In terms of section 1 of the Riotous Assemblies Act 17 of 1956, a public place included "any street, road, passage, square, park or recreation ground, or any open space, to which all members of the public habitually or by right have access, and

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[32] A Layard "Public space: Property, lines, interruptions" (2016) 2 *Journal of Law, Property and Society* 1 19.

[33] J McLean "Property as power and resistance" in J McLean (ed) *Property and the constitution* (1999) 1 5, 9 questions whether it really matters whether property is privately owned or publicly owned for it to be considered "public". She argues that with certain publicly owned property, the government's proprietary rights will be the same as a private owner due to the nature of the property. Therefore, some state owned properties are similar to private property. As a result, these publicly owned properties enjoy similar exclusivity rules than those typically enjoyed by privately owned properties.

[34] See L du Plessis *Re-interpretation of statutes* (2002) 262-263.

includes any place described in this definition notwithstanding that it is private property and has not been dedicated to the use of the public."[35] The definition of a "public place" had to be met before a "public gathering"[36] could be prohibited. This definition expressly includes private property to which the public has access, even if the property had not been made available for public use. Should the above legislative framework be used as a guide to interpret the definition of a "gathering" in section 1 of the Gatherings Act, it would seem as if the definition extends to certain types of privately owned property.

However, the above legislative framework should be understood in the context of the time during which it was promulgated. Similarly, the Gatherings Act also needs to be understood in the context of the time during which it was enacted. While the former was passed in a time of the repression of mass political dissent, the latter was passed in the new constitutional dispensation. Furthermore, the definition of a gathering being met in terms of the Riotous Assemblies Act was required to prohibit gatherings, which resulted in the suppression of mass dissent. This contrasts with the definition of a gathering in terms of the Gatherings Act being met, which seeks to protect and advance the right to assemble and demonstrate in section 17 of the Constitution.

Despite the different contexts in which these two statutes operated, a similar interpretation of the places to which the Riotous Assemblies Act applies could be extended to the places to which the Gatherings Act applies. The interpretation of "public place" in the Riotous Assemblies Act places emphasis on the access enjoyed by the public and the actual use of the place, instead of the ownership or intended use of the place. In this regard, places that were privately owned, which were accessible to the public and actually used by the public would qualify as a "public place" for purposes of the Riotous Assemblies Act. If this statute is used as a guide to interpret "any other public place or premises" for purposes of the Gatherings Act, it would mean that the requirements for a lawful gathering would extend to privately owned places or premises to which the public has access, which is actually used by the public, regardless of the intended use by the property owner. This interpretation of "any other

[35] Section 1 of the Riotous Assemblies Act 17 of 1956.

[36] Section 1 of the Riotous Assemblies Act 17 of 1956 defines a "public gathering" as "any gathering, concourse, or procession in, through, or along any public place, of twelve or more persons having a common purpose, whether such purpose be lawful or unlawful."

public place or premises" is a useful starting point in determining the circumstances in which the definition of a "gathering" may extend to privately owned property.[37]

3 3 3 3 Public-accessibility as a prerequisite before a place or premises may be considered "public"

Based on the analysis above, the ability of the public to access and use a place or premises will determine whether a privately owned place or premises may be considered "public" for purposes of the Gatherings Act. In this regard, the extent of public-accessibility to a place may be a determinant factor in determining whether a place or premises is "public".

Page defines public property as being property that is "not private property."[38] While he warns against trying to define "public property" in certain terms, he argues that it usually involves the type of property to which one individual has no greater claim than another.[39] In this regard, "public property" usually embodies some sort of communal property, which is open for all individuals to use and enjoy, and is measured by the sum of the individual claims thereto.[40] This argument rests on the fact that a place or premises may be considered public if, at the very least, it is open to the public for their use and enjoyment, and that no individual may have a greater claim to use and enjoy it than another.

This argument provides a useful starting point for the notion of "quasi-public" property, which could assist in identifying when a place or premises may be considered "public". The concept of "quasi-public" was used by Gray and Gray, who argue that "private property is never truly *private* and rarely truly *absolute*."[41] They argue that because the public social order builds its foundations on the

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[37] See L du Plessis *Re-interpretation of statutes* (2002) 262-263.

[38] J Page "Towards an understanding of public property" in N Hopkins (ed) *Modern studies in property law: Volume 7* (2013) 195 196.

[39] J Page "Towards an understanding of public property" in N Hopkins (ed) *Modern studies in property law: Volume 7* (2013) 195 196.

[40] J Page "Towards an understanding of public property" in N Hopkins (ed) *Modern studies in property law: Volume 7* (2013) 195 196.

[41] K Gray & SF Gray "Private property and public propriety" in J McLean (ed) *Property and the constitution* (1999) 11 18.

"*restrictiveness*, rather than the *amplitude*"[42] of the property regime, it confirms that all property has a public nature.[43] It is in this sense that they argue that the divide between private and public property cannot be strictly defined, but that property as a whole rather amounts to a "'spectrum' concept."[44]

Gray and Gray argue that "quasi-pubic" property is best displayed with reference to shopping malls and civil commercial centres.[45] While these types of places are often privately owned, they are open to the general public.[46] The mere fact that such places seek to invite members of the public to be included in the enjoyment and use of the property, raises serious questions about whether exercising ownership rights over these types of property occur within a "purely private zone".[47] Therefore, despite their private ownership, places such as shopping malls and civil commercial centres have a "profoundly public dimension".[48]

Van der Walt elaborates by giving content to the concept "quasi-public".[49] He argues that a quasi-public space is a privately owned space used for some sort of public purpose, which the public can more or less access freely.[50] Furthermore, the space must be "suitable and actually used for"[51] some public purpose, such as exercising a right to demonstrate, for it to qualify as quasi-public. These requirements

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[42] K Gray & SF Gray "Private property and public propriety" in J McLean (ed) *Property and the constitution* (1999) 11 19.

[43] K Gray & SF Gray "Private property and public propriety" in J McLean (ed) *Property and the constitution* (1999) 11 19.

[44] K Gray & SF Gray "Private property and public propriety" in J McLean (ed) *Property and the constitution* (1999) 11 13.

[45] K Gray & SF Gray "Private property and public propriety" in J McLean (ed) *Property and the constitution* (1999) 11 20.

[46] K Gray & SF Gray "Private property and public propriety" in J McLean (ed) *Property and the constitution* (1999) 11 20.

[47] K Gray & SF Gray "Private property and public propriety" in J McLean (ed) *Property and the constitution* (1999) 11 20.

[48] K Gray & SF Gray "Private property and public propriety" in J McLean (ed) *Property and the constitution* (1999) 11 20.

[49] AJ van der Walt "The modest systemic status of property rights" (2014) 1 *Journal of Law, Property, and Society* 15 29.

[50] AJ van der Walt "The modest systemic status of property rights" (2014) 1 *Journal of Law, Property, and Society* 15 29.

[51] AJ van der Walt "The modest systemic status of property rights" (2014) 1 *Journal of Law, Property, and Society* 15 29.

confirm that the space merely needs to be suitable for public use and actually used publicly. In other words, the primary use of the property does not have to be for the exercise of the right to demonstrate for it to be classified as quasi-public. Instead, the place merely needs to be used for a public purpose and be freely accessible to the public for it to be considered quasi-public.

Closely related to the term "quasi-public" is a concept that Page calls an "illusory public"[52] place. He refers to the best example of an illusory public place: the shopping mall.[53] He argues that such places create the illusion that they are public spaces.[54] However, such places are usually privately owned, even though they are accessible to the public.[55] He argues, however, that "[t]he illusion is shattered when private owners enforce behaviour or dress codes, or restrain public assembly or political protest."[56] Therefore, the enforcement by private owners of their right to exclude has the effect of reinforcing their private ownership, in a place to which the public has free access. Page claims that this will have severe implications for the owners' right to exclude,[57] which Van der Walt argues should be limited in certain circumstances, because the "pursuit of non-property objectives is sometimes systemically more important than protecting property rights."[58] This view is supported by Dhliwayo, who argues that the rights of owners to exclude non-owners from their property is limited

[52] J Page "Towards an understanding of public property" in N Hopkins (ed) *Modern studies in property law: Volume 7* (2013) 195 201.

[53] J Page "Towards an understanding of public property" in N Hopkins (ed) *Modern studies in property law: Volume 7* (2013) 195 201-202. See also K Gray & SF Gray "Private property and public propriety" in J McLean (ed) *Property and the constitution* (1999) 11 19-20.

[54] J Page "Towards an understanding of public property" in N Hopkins (ed) *Modern studies in property law: Volume 7* (2013) 195 202. See also K Gray & SF Gray "Private property and public propriety" in J McLean (ed) *Property and the constitution* (1999) 11 20.

[55] J Page "Towards an understanding of public property" in N Hopkins (ed) *Modern studies in property law: Volume 7* (2013) 195 202. See also K Gray & SF Gray "Private property and public propriety" in J McLean (ed) *Property and the constitution* (1999) 11 20.

[56] J Page "Towards an understanding of public property" in N Hopkins (ed) *Modern studies in property law: Volume 7* (2013) 195 202.

[57] J Page "Towards an understanding of public property" in N Hopkins (ed) *Modern studies in property law: Volume 7* (2013) 195 202.

[58] AJ van der Walt "The modest systemic status of property rights" (2014) 1 *Journal of Law, Property, and Society* 15 43.

by non-property constitutional rights.[59] Therefore, when private owners enforce dress codes or restrain assembly, the illusion that public places, such as shopping malls, are actually privately owned, is shattered. In this regard, it may be necessary to restrict the owners' ability to enforce dress codes or restrain assembly in light of the arguments by Van der Walt and Dhliwayo. Should the owners' right to exclude in these circumstances be restricted, the illusion could be maintained. In this regard, it is evident that such places bear striking resemblances to "quasi-public" places as argued by Gray and Gray,[60] because they are typically open-access private properties, which "foster illusory expectations of public rights of inclusion."[61]

Therefore, the above arguments support the fact that some privately owned places or premises may be considered "public" for purposes of the Gatherings Act. At its core, a public place or premises is one where no-one has a greater claim to such place as another. These places or premises may only be considered public should they be freely accessible to the public. Furthermore, these places and premises should be suitable to be used publicly, and should actually be used publicly. Should private property owners wish to grant access to the public, and to allow them to use the property, it is necessary that the owners' right to exclude be limited in order to ensure the continued public-accessibility and public use of the property.

3 3 3 4 The ability to lawfully evict persons from property as a prerequisite before a place or premises may be considered "public"

Based on the arguments above, a place or premises can only retain its public nature should an owner be willing to allow her right to exclude to be limited in certain circumstances. These circumstances could include scenarios where members of the public wish to demonstrate or assemble on her property. In other words, a place will not be considered public when there is no limitation of the owners' right to exclude, and she retains her ability to lawfully evict persons from her property. Therefore, she

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[59] P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch (2015) 113.

[60] K Gray & SF Gray "Private property and public propriety" in J McLean (ed) *Property and the constitution* (1999) 11 11.

[61] J Page "Towards an understanding of public property" in N Hopkins (ed) *Modern studies in property law: Volume 7* (2013) 195 201.

may only evict persons from her property where she retains her right to exclude because the property is no longer public.

This accords with the arguments of Layard who argues that despite a place being accessible to the public, and actually used for a public purpose, this is not the determinant factor when deciding whether a place or premises is "public". She states that "public space is produced through property relationships, partially realized through lines and that opportunities exist for public space 'interruptions'".[62] She refers to a case study involving a protest at Paternoster Square in London in October 2011.[63] This square was physically open to the public, but was privately owned.[64] As soon as protestors entered Paternoster Square, legal measures were taken to prevent the occupation of the property by protestors.[65] These measures included the use of signage preventing entry to the property, the use of private bodyguards at entrances, and the use of injunctions to evict the protestors.[66]

Layard argues that public or state ownership is not a prerequisite for property to be considered a "public space".[67] She states that while Paternoster Square had the appearance of a "public space",[68] the owners thereof were able to evict the protestors with relative ease, despite it being considered public. In this sense, the "ease with which members of the public can be evicted or prevented from entering privately owned land"[69] could be important in determining whether privately owned property can be considered a "public space". This could help determine whether a privately owned

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[62] A Layard "Public space: Property, lines, interruptions" (2016) 2 *Journal of Law, Property and Society* 1 3.

[63] A Layard "Public space: Property, lines, interruptions" (2016) 2 *Journal of Law, Property and Society* 1 5.

[64] A Layard "Public space: Property, lines, interruptions" (2016) 2 *Journal of Law, Property and Society* 1 6.

[65] A Layard "Public space: Property, lines, interruptions" (2016) 2 *Journal of Law, Property and Society* 1 6.

[66] A Layard "Public space: Property, lines, interruptions" (2016) 2 *Journal of Law, Property and Society* 1 6.

[67] A Layard "Public space: Property, lines, interruptions" (2016) 2 *Journal of Law, Property and Society* 1 19.

[68] A Layard "Public space: Property, lines, interruptions" (2016) 2 *Journal of Law, Property and Society* 1 6.

[69] A Layard "Public space: Property, lines, interruptions" (2016) 2 *Journal of Law, Property and Society* 1 12.

place or premises is public for purposes of the definition of a gathering in section 1 of the Gatherings Act. This could hinge mainly on the ability of the owner of the property to evict unwanted persons from her property. In other words, the more ability the owner has to evict unwanted persons, the less likely the place or premises will be considered "public".

This dilemma could be illustrated with reference to *BVerfGE* 128, 226 (2011), *Fraport*. In this case, a ban was issued against the complainant by the defendant, which prohibited the complainant from accessing the entire airport with the aim of holding a demonstration. The court had to decide upon the validity of this ban, by considering the property rights of the defendant, as well as the right to freedom of assembly and freedom of expression of the complainant. The court held that an owner's reliance on the right to undisturbed possession depends on the access the owner grants the public to their property.[70] In other words, the owner could not exclude members of the public from her property purely based on the rights enjoyed by the owner. Instead, due regard had to be given to the rights of the members of the public before the owner excluded members of the public from her property. Therefore, a limitation on the public's right to freedom of assembly required a legitimate purpose before the limitation could be enforced. In this case, the court found that the ban could only be upheld for areas of the airport to which the public did not have general access, such as security areas, luggage collection areas, and air-side restaurants and shops.[71] Therefore, the ban on demonstrations in areas of the airport to which the public had general access, such as land-side restaurants and shops, could not be upheld.[72] In this regard, the owner could only lawfully evict people from her property from areas in the airport to which the public did not have general access.

In South Africa, a property owner would need to rely on the Trespass Act 6 of 1959 to evict unwanted persons, such as those temporarily on their property for an assembly or demonstration, from her property. According to section 1 of the Trespass Act:

> "(1) Any person who without the permission-
> *(a)* of the lawful occupier of any land or any building or part of a building; or

[70] *BVerfGE* 128, 226 (2011), *Fraport* para 86.
[71] *BVerfGE* 128, 226 (2011), *Fraport* para 72.
[72] *BVerfGE* 128, 226 (2011), *Fraport* para 72.

> *(b)* of the owner or person in charge of any land or any building or part of a building that is not lawfully occupied by any person,
> enters or is upon such land or enters or is in such building or part of a building, shall be guilty of an offence unless he has lawful reason to enter or be upon such land or enter or be in such building or part of a building."

These provisions of the Trespass Act indicate that the property owner may not invoke these provisions when the alleged trespasser either has "permission" from the property owner, or has "lawful reason" to enter or be on the property. An interpretation of "permission" or "lawful reason" requires the identification of the circumstances in which the provisions of the Trespass Act may not be invoked. These circumstances would thus deem the property "public" for the purposes of Layard's argument, and thus add weight in determining what exactly constitutes "any other public place or premises" for purposes of the definition of a gathering.

Firstly, "permission" could be granted expressly or tacitly. Express permission could be granted in instances where private property owners invite the public to enter their premises. For example, the owner of a shopping mall would often invite members of the public to enjoy the wide selection of shopping, entertainment and restaurant facilities it has to offer. Such an invite automatically limits the rights of the property owner, and thus makes it challenging for the property owner to invoke the provisions of the Trespass Act. This accords with the position in *Marsh v Alabama*,[73] in which the court held that a property owner's rights become more circumscribed the more they make their property available to the public in general.[74] Furthermore, a similar restriction could be imposed on the rights of the property owner in the case of tacit permission. This could be granted by the property owner should she fail to object to alleged trespassers regularly entering her property.[75] For example, the owner of a shopping mall or public square may not necessarily invite the public to enter her

[73] 326 US 501 (1946).

[74] *Marsh v Alabama* 326 US 501 (1946) 506.

[75] S Wilson & I de Vos in *Ex Parte: Council for the Advancement of the South African Constitution In Re: Restraint of protest on or near university campuses* Chambers, Johannesburg (22 December 2016) para 104. Although this was written in the context of universities, it can be extended to other circumstances.

premises, but she will also fail to object to the entry when members of the public periodically enter her property.

Secondly, the provisions of the Trespass Act indicate that the property owner may not invoke these provisions when the person on the property has "lawful reason" to enter or be on the property. "Lawful reason" could arise out of a contract between the property owner and the alleged trespasser, which grants the alleged trespasser an implied right to be on the property.[76] This will include situations in which members of the public access a privately owned park or square that is open to the public, as well as shopping malls. Furthermore, an alleged trespasser who mistakenly believes that she has lawful reason to be on the property, lacks the necessary knowledge of the unlawfulness of her actions, and thus the necessary intention to trespass.[77] Therefore, she will still have "lawful reason" to be on the property.[78]

By using the arguments of Layard, it can be concluded that a place could be considered "any other public place or premises" for purposes of section 1 of the Gatherings Act in the above circumstances. The ability of a property owner to rely on her right to exclude and use the provisions of the Trespass Act are limited in certain circumstances. These include scenarios where the public is invited to use the property, where members of the public regularly enters the property without objection, where the public has a lawful reason to be on the property in terms of a contractual right, or the member of the public has no intention to trespass. The only manner in which the property owner may withdraw permission for the alleged trespasser to be on the

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[76] S Wilson & I de Vos in *Ex Parte: Council for the Advancement of the South African Constitution In Re: Restraint of protest on or near university campuses* Chambers, Johannesburg (22 December 2016) para 103. This was also written in the context of universities, but is broad enough to extend to various other circumstances.

[77] *S v Peter Joseph Davids* 1966 1 PH H26 (N) 52. See further S Wilson & I de Vos in *Ex Parte: Council for the Advancement of the South African Constitution In Re: Restraint of protest on or near university campuses* Chambers, Johannesburg (22 December 2016) para 105.

[78] *S v Peter Joseph Davids* 1966 1 PH H26 (N) 52. See further S Wilson & I de Vos in *Ex Parte: Council for the Advancement of the South African Constitution In Re: Restraint of protest on or near university campuses* Chambers, Johannesburg (22 December 2016) para 105.

property is if it has a "lawful basis".[79] For the purposes of the Gatherings Act, it is unlikely that the prevention of the right to assemble and demonstrate on the privately owned property is enough of a "lawful basis" to allow the property owner to rely on the provisions of the Trespass Act. This position would accord with the arguments by Van der Walt and Dhliwayo,[80] because the owners' right to exclude would be limited due to the exercise of a non-property constitutional right being sought.[81]

Based on the analysis above, it is clear that a place or premises may be considered "public" when the property owner no longer retains the ability to lawfully evict unwanted persons from her property. According to South African law, the ability to lawfully evict persons from her property will depend mainly on the access granted to the public. In this regard, the greater the access a property owner grants members of the public, the less likely it would be for the owner to lawfully evict unwanted persons from her property.

3 3 3 5 The effect of temporarily restricting access to places or premises on the public-nature thereof

Given the arguments above, a place or premises may be considered "public" for purposes of the Gatherings Act when it is accessible to the public, it is actually used for a public purpose, and the private property owner is unable to lawfully evict persons from the property. However, despite these indicators that a place or premises may be public, a change in circumstances could change the public nature of the place or premises. In this regard, *Semple v Howes*,[82] as well as *Semple v Carson*,[83] could provide assistance. These cases are especially relevant, as they involve alleged criminal offences conducted during a demonstration on privately owned property.

The circumstances surrounding the demonstration were outlined in *Semple v Howes*. This demonstration was held to oppose the use of uranium at the Olympic

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[79] S Wilson & I de Vos in *Ex Parte: Council for the Advancement of the South African Constitution In Re: Restraint of protest on or near university campuses* Chambers, Johannesburg (22 December 2016) para 105.

[80] AJ van der Walt "The modest systemic status of property rights" (2014) 1 *Journal of Law, Property, and Society* 15 43; P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch (2015) 113.

[81] See 3 3 3 3 above.

[82] (1985) 38 SASR 34.

[83] (1984) 35 SASR 589.

Dam mining area in the north of the state of South Australia. The demonstration commenced at the end of August 1983. The land on which the mining operations occurred was being held through a pastoral lease from the Crown, but the actual mining operations were being carried out by Roxby Management Services (Pty) Ltd ("Roxby") on behalf of three companies acting as a joint venture. Roxby had taken active steps to restrict access to their property and any movement by demonstrators already on their property. These steps include notices placed at the entrances of the mines by Roxby restricting entrance to authorised persons only.

Charges were brought against the respondent in terms of section 18(3) of the Police Offences Act.[84] This provision permitted charges to be brought against anyone who continued to loiter in a public place after being asked to desist from doing so by a police officer, provided such officer had a reasonable belief or apprehension that such person had been loitering. Section 18 of the Police Offences Act does not define the term "public place", but section 4 states that a public place includes:

> "(a) a place to which free access is permitted to the public, with the express or tacit consent of the owner or occupier of that place; and
> (b) a place to which the public are admitted on payment of money, the test of admittance being the payment of money only; and
> (c) a road, street, footway, court, alley or thoroughfare which the public are allowed to use, notwithstanding that that road, street, footway, court, alley or thoroughfare is on private property".[85]

This provision confirms that a public place is determined with reference to the use thereof, and level of access granted to the public, rather than by determining who the owner of the place is. The court had to decide whether the respondent could be charged in terms of section 18(3) of the Police Offences Act, based on the uncertainty of the interpretation of the words "public place".[86] While the court held that the above provision does not amount to a definition in the strict sense, it admitted that formulating

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[84] *Semple v Howes* (1985) 38 SASR 37. See further section 18(3) of the Police Offences Act 1953-1983.

[85] Section 4 of the Police Offences Act 1953-1983.

[86] *Semple v Howes* (1985) 38 SASR 37.

a definition for the term "public place" is "hardly possible".[87] Despite this concern, the court was left to decide whether the privately owned property in question amounted to a "public place" for the purposes of the Police Offences Act.

The court referred to *Semple v Carson*,[88] to determine whether privately owned property could be deemed a public place for purposes of the Police Offences Act. This case dealt with the same group of demonstrators who occupied property in *Semple v Howes*.[89] The court stated that in circumstances where the occupation itself is key in the demonstration on the property, the privately owned space cannot be deemed "public" for the purposes of section 18 of the Police Offences Act for the duration of the occupation.[90] The court stated that "something more"[91] than just the act of demonstration was required to deem the place a "public place".[92]

The court in *Semple v Howes* thus had to turn its inquiry into whether the public at large was admitted to enter the private property. The court considered a notice placed at the entrances of the property, which restricted entry to authorised persons and vehicles only. The notice required that all other persons should report to an administrative office on the property to obtain permission to enter.

Despite the notice, Roxby allowed persons entry even if they did not report to the administration office, provided they remained on the roads on the property. A witness from Roxby testified that the public access was also subject to good behaviour. Despite the notices restricting access to the public, the failure by Roxby to strictly enforce the terms of the notice was sufficient to deem the place "public". During the course of the demonstration, access to the property was limited to persons on foot, and all cars and similar vehicles were prohibited from entering the property. The court

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[87] *Semple v Howes* (1985) 38 SASR 37.

[88] (1984) 35 SASR 589.

[89] (1985) 38 SASR 34.

[90] *Semple v Howes* (1985) 38 SASR 42-43.

[91] *Semple v Howes* (1985) 38 SASR 43.

[92] *Semple v Howes* (1985) 38 SASR 43. A Layard "Public space: Property, lines, interruptions" (2016) 2 *Journal of Law, Property and Society* 1 34 argues that "[i]t is also striking that if a protest becomes too settled, it transforms from a public space… to a private one." Therefore, based on the commentary of Layard, it could be argued that the occupation of property in *Semple v Carson* turned the public place into a private one. This, Layard argues, could have the effect of turning the issue from the right to freedom of assembly, expression and association, to the right to a home.

held that the place remained public, even though access was only granted to a limited class of persons, namely those on foot.

Therefore, the above cases offer guidance should a similar scenario occur in terms of the Gatherings Act. In other words, circumstances surrounding a gathering could change, which may affect the public nature of a place or premises. These include circumstances in which privately owned property is restricted to certain classes of persons.

3 3 3 6 Concluding remarks

As a result of the discussion above, it is clear that the Gatherings Act applies to privately owned places or premises in certain cases. This confirms Layard's argument that public ownership is not a prerequisite for property to be considered a "public space".[93] This also confirms McLean's argument that the nature of the owner of the property should not determine whether it is "public"[94] and whether it would subsequently amount to "any other public place or premises".

Despite the fact that the Gatherings Act does not specifically mention privately owned property, the wording in the definition of a gathering, as well as the authority mentioned above, indicates that "any other public place or premises" includes privately owned property. This hinges on the fact that a place or premises does not have to be publicly owned for it to be considered "public". This would, however, require that the privately owned property be open or accessible to the public, or accessible to certain members of the public who have a contractual right to be on the property. There does not need to be a formal invitation for the public to enter the property, because the omission on the part of the property owner to object to the regular entry by persons would suffice. The property also needs to be used publicly, regardless of the intended use by the property owner. Should these circumstances exist, a property owner may not lawfully evict persons from the property by using the Trespass Act, because the circumstances are sufficient to justify a limitation on the owners' right to exclude. It is doubtful whether the owner could lawfully withdraw a person's right to be on her

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[93] A Layard "Public space: Property, lines, interruptions" (2016) 2 *Journal of Law, Property and Society* 1 19.

[94] J McLean "Property as power and resistance" in J McLean (ed) *Property and the constitution* (1999) 1 9.

property if such person is exercising a non-property constitutional right, because the exercise of such right would be a justifiable limitation on the owners' right to exclude.[95] Furthermore, privately owned property typically open to the public remains public when occupied by demonstrators, even when measures restricting access are put in place. However, this may change depending on the length of time the demonstrators occupy such property.

3 3 4 "Wholly or partly open to the air" in terms of section 1 of the Gatherings Act

While a "public place or premises" has been defined, the remainder of the definition of a "gathering" relevant to this thesis requires the public place or premises to be "wholly or partly open to the air".[96] Places or premises wholly or partly open to the air are usually those areas to which the public has greater access and use rights, and areas in which it may be difficult for an owner to exclude others. This is unsurprising, given the indicators of privately owned public places or premises discussed above.

Layard refers to the term "wholly or partly open to the air" in the context of protests in the United Kingdom:

> "Public assemblies, particularly protest camps, can also interrupt. Defined as two or more people assembling in a public place that is wholly or partly open to the air, these protests do not require notification and do not of themselves need to involve movement; they can be static."[97]

This definition has striking resemblances to the definition of a gathering in the Gatherings Act, but does not have a lower limit in terms of participants, and does not require notice. However, Layard later argues that this definition usually extends to public assemblies on public land, which, in the context of her arguments, could refer

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[95] AJ van der Walt "The modest systemic status of property rights" (2014) 1 *Journal of Law, Property, and Society* 15 27-30; P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch (2015) 113.

[96] A Layard "Public space: Property, lines, interruptions" (2016) 2 *Journal of Law, Property and Society* 1 33.

[97] A Layard "Public space: Property, lines, interruptions" (2016) 2 *Journal of Law, Property and Society* 1 33.

to publicly owned land.[98] Even though her definition refers specifically to "wholly or partly open to the air", it adds little in determining what the phrase means for purposes of section 1 of the Gatherings Act.

Therefore, other sources will need to be considered when determining what the phrase "wholly or partly open to the air" means. In this regard, reference can be made to statutes that the Gatherings Act sought to repeal, but contained similar definitions related to protests. Section 2(3)(a) of the Riotous Assemblies Act 17 of 1956 granted the Minister of Justice the power to prohibit any class of gatherings. While exercising this power, the Minister of Justice issued a notice that was published in *Government Gazette* 5758 on 30 September 1977.[99] The notice stated that all gatherings, except those taking place within the walls of a building, those of a *bona fide* sporting nature and those expressly authorised by the magistrate in the particular district, are to be prohibited.[100]

Based on this notice, gatherings that take place wholly inside the walls of a building may be conducted lawfully. Therefore, any gatherings that were not expressly authorised or were not of a *bona fide* sporting nature, which occurred outside of the walls of a building, were expressly prohibited. This interpretation is a useful guide in interpreting "wholly or partly open to the air", because it indicates what types of gatherings sought to be prohibited in terms of the Riotous Assemblies Act. Based on this interpretation, the Gatherings Act's reference to "wholly or partly open to the air" could be given similar content to those gatherings not inside the walls of a building, as envisaged by the above notice.

Similarly, the term "wholly or partly open to the air" extends to "open-air" gatherings, which is typically the case with gatherings of a *bona fide* sporting nature. However, events such as sporting events will not meet the requirements of a gathering even if they take place in a public place or premises "wholly or partly open to the air", because they do not contain the political or moral content required by sections (a) and (b) of the definition of a gathering. According to the multinational panel of the Goldstone

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[98] A Layard "Public space: Property, lines, interruptions" (2016) 2 *Journal of Law, Property and Society* 1 34.

[99] *GG* 5758 of 30-09-1977. See also the discussion of *S v Mtutuzeli* 1979 1 SA 764 (T) in 2 2 2 3 above, in which it was pointed out that this specific notice was central to the case at hand.

[100] *GG* 5758 of 30-09-1977.

Commission, similar exceptions should be granted to events such as funerals, parties and church services.[101]

Therefore, while little has been written on the interpretation on "wholly or partly open to the air" in terms of section 1 of the Gatherings Act, the above discussion provides insight into a possible interpretation. A gathering occurring in or on any other public place or premises "wholly or partly open to the air" thus means that such a gathering is an open-air gathering, or one that is not confined wholly inside the walls of a building. The definition of a gathering will not extend to certain events, such as sporting events, parties, funerals and church services even though they would otherwise fall within the scope of occurring in or on any other public place or premises "wholly or partly open to the air".

3 4 Conclusion

The purpose of this chapter was to discuss the requirements for holding a lawful gathering, and to determine whether these requirements extend to gatherings on privately owned property. In this regard, this chapter sought, firstly, to outline and interpret the definition of a "gathering". Secondly, this chapter sought to outline the requirements to hold a lawful gathering in accordance with the Gatherings Act. Lastly, this chapter aimed to determine whether the definition of a gathering extends to privately owned property.

The definition of a "gathering" in the Gatherings Act was discussed and compared to the definition of a "demonstration". A few concerns regarding the interpretation of these concepts were briefly highlighted. The requirements for conducting a lawful gathering were discussed, with a particular focus on the procedures to be followed immediately preceding the gathering in sections 2, 3 and 4 of the Gatherings Act. This is important as the following chapter assumes that these procedures are followed and that a lawful gathering is thus constituted.

The types of property to which the requirements for a lawful gathering applies was determined with reference to legislation, case law and academic commentary. It was found that the Gatherings Act extends to public roads, publicly owned property, as well as privately owned property. However, the Act only extends to privately owned

[101] P Heymann *Towards peaceful protests in South Africa* (1992) 11.

property when the property is open or accessible to the public, and is actually used publicly. Furthermore, the nature of privately owned property being considered “public” in cases where access to the property is restricted, may change depending on the facts of each case. This will be influenced by the nature of the restriction, as well as the duration of the gathering. However, whether it extends to privately owned places or premises will depend on whether it is wholly or partly open to the air. This requires that the gathering be an open-air gathering, or that it be held outside the confines of the walls of a building.

Ultimately, this chapter sought to establish whether the definition of a gathering in the Gatherings Act extends to privately owned property. In light of the conclusion that the definition does, in fact, extend to privately owned property in certain circumscribed cases, the next chapter will focus on whether exercising the right to assemble and demonstrate on privately owned property has any effect on section 25(1) of the Constitution. Therefore, the conclusions drawn in this chapter will be used to determine whether the Gatherings Act permits a deprivation of property in a manner inconsistent with section 25(1) of the Constitution.

CHAPTER 4: THE EFFECT OF HOLDING A "GATHERING" ON PRIVATELY OWNED PROPERTY

4 1 Introduction

In chapter two, the focus was on the history of the legislative framework on protests, which highlighted the need for new legislation regulating protests in the new constitutional dispensation. In chapter three, the content of the Regulation of Gatherings Act 205 of 1993 ("Gatherings Act") was discussed, with a particular focus on the requirements for holding a lawful gathering and the extent to which it applies to privately owned property. In chapter three, it was shown that the Gatherings Act permits a gathering in or on any public place or premises, whether privately owned or publicly owned, provided they are freely accessible to the public, are actually used publicly, and are not inside the walls of a building. This finding raises the question of whether the property owners of such public places may rely on section 25(1) of the Constitution of the Republic of South Africa, 1996, to claim that the Gatherings Act permits a deprivation of property in a manner inconsistent with section 25(1).

This chapter will determine whether the Gatherings Act permits a deprivation of property in a manner inconsistent with section 25(1), and, if so, in which circumstances. It will do so, firstly, by determining the types of property owners that may rely on section 25(1) when a gathering is held on their property. Secondly, this chapter will determine whether action typically associated with gatherings constitutes a deprivation. In this regard, the understanding of "deprivation" outlined by the Constitutional Court, will also be considered. This assessment will determine whether the commencement of a "gathering" on privately owned property amounts to a deprivation of property for purposes of section 25(1) of the Constitution. Lastly, the circumstances in which a deprivation may be consistent with section 25(1) of the Constitution will be discussed. This will include a discussion on whether the deprivation is authorised in terms of law of general application and whether it is arbitrary. The discussion on arbitrariness will include a suggestion of factors the courts could use to determine whether a deprivation of property caused by a gathering is substantively arbitrary.

The purpose of this chapter, therefore, is to determine whether the Gatherings Act permits a deprivation of property. If there is a deprivation of property, this chapter will

determine whether the deprivation is consistent with the requirements of section 25(1) of the Constitution. Should an owner be entitled to rely on section 25(1) and prove that the gathering held on her property causes a deprivation, this chapter sets out a framework to deal with the question whether such deprivation is consistent with the requirements for a valid deprivation in section 25(1) of the Constitution.

4 2 Beneficiaries of section 25(1) of the Constitution

Before deciding whether section 25(1) is applicable in the case of property owners affected by the Gatherings Act, it is necessary to identify the types of property owners that may rely on section 25(1) of the Constitution. These property owners will be the only beneficiaries of section 25(1) of the Constitution.

Section 25(1) of the Constitution states that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." This provision refers to "no one", which means that natural persons may not be denied the right in section 25(1),[1] and are beneficiaries of section 25(1) as such. Furthermore, section 8(4) of the Constitution states that "[a] juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person." Van der Walt argues that nothing precludes a juristic person from being a beneficiary of section 25 of the Constitution.[2] However, the facts of each individual case will need to be considered before a determination in each case can be made.[3]

The position of the state as a beneficiary of the rights in section 25 was addressed by the Constitutional Court in *Tshwane City v Link Africa (Pty) Ltd*.[4] In this case, the court held that Tshwane City Municipality forms part of the state and can thus not be a beneficiary of the right contained in section 25(1) of the Constitution.[5] Van der Walt

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[1] I Currie & J de Waal *The bill of rights handbook* 6 ed (2013) 34.

[2] AJ van der Walt *Constitutional property law* 3 ed (2011) 70. See also T Roux "Property" in S Woolman & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 2013) ch 46 9; H Mostert & PJ Badenhorst "Property and the bill of rights" in Y Mokgoro & P Tlakula (eds) *Bill of rights compendium* (RS 2015) ch 3FB 12.

[3] AJ van der Walt *Constitutional property law* 3 ed (2011) 70-71.

[4] 2015 6 SA 440 (CC).

[5] *Tshwane City v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC) paras 53-54.

also argues that the state, including state departments and state organs, cannot enjoy the protection of section 25 of the Constitution and is thus not a beneficiary of the rights contained in section 25 of the Constitution.[6] He does, however, argue that exceptions may be granted for partially state owned bodies or semi-autonomous state bodies.[7]

Given the discussion above, it is clear that only private property owners may rely on section 25(1) of the Constitution in cases where the Gatherings Act permits a deprivation of their property. These private property owners may include natural persons such as private landowners, or juristic persons such as privately owned companies. Therefore, the state, including municipalities, may not rely on section 25(1) of the Constitution when a gathering causes a deprivation of its property.

4 3 An illustration of how the Gatherings Act permits a deprivation of property for purposes of section 25(1) of the Constitution

4 3 1 Overview

The definition of "deprivation" in section 25(1) of the Constitution will be used to show how the Gatherings Act permits a deprivation of property. To illustrate this, reference will be made to instances where action typically associated with a gathering caused some or other interference for property owners. This conduct will then be tested against the Constitutional Court's understanding of a "deprivation".

4 3 2 Examples of action typically associated with a gathering that may cause a deprivation of property

A number of cases have involved action by people gathering in a certain area, which could potentially cause a deprivation of property for purposes of section 25(1) of the Constitution. In *Fourways Mall (Pty) Ltd v South African Commercial Catering ("Fourways Mall")*,[8] a trade union held a protected strike aimed at one of the lessees of a privately owned shopping mall where members of the trade union were employed.

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[6] AJ van der Walt *Constitutional property law* 3 ed (2011) 71-72.

[7] AJ van der Walt *Constitutional property law* 3 ed (2011) 72.

[8] 1999 3 SA 752 (W) 754. See also 2 3 4 above.

The trade union conducted the strike by blocking the entrances of the shopping mall, and impeding the movement of customers of the targeted lessee, as well as that of other lessees in the shopping mall. Their actions also extended to intimidating members of the public, employees of the targeted lessee, as well as employees of other lessees of the shopping mall.

A similar scenario occurred in *Growthpoint Properties Limited v South Africa Commercial Catering and Allied Workers Union (SACCAWU)* ("*Growthpoint*").[9] In this case, a group of people (members of the respondent) occupied the basement parking lot of a privately owned shopping mall to hold a picket in accordance with a picketing agreement between the respondent and the business employing members of the respondent. This business leased its premises from the applicant, and the shopping mall was accessible to the public at large. The members of the respondent resorted to actions such as shouting, singing, ululating, blowing whistles and banging instruments as part of their picket. These actions halted the operations of nearby businesses and intimidated patrons of the shopping mall.

In *Hotz v UCT*,[10] students at the University of Cape Town erected a shack in a road on the university's premises as a form of protest against the university's failure to address its colonial heritage and the manner in which it failed to provide poorer students with accommodation. The position of the shack, as well as the gathering of students surrounding it, not only disrupted traffic, but also the flow of pedestrians.

In a case study referred to by Layard, protestors intended to occupy Paternoster Square in London in October 2011.[11] The square was privately owned, but was open to the public at large.[12] The protestors intended to occupy the privately owned place for an indefinite period, rather than cause a once-off, temporary disruption to the public-accessibility of the square. In order to achieve this purpose, they intended to

[9] 2010 JDR 1015 (KZD).

[10] 2016 4 All SA 723 (SCA).

[11] A Layard "Public space: Property, lines, interruptions" (2016) 2 *Journal of Law, Property and Society* 1 5.

[12] A Layard "Public space: Property, lines, interruptions" (2016) 2 *Journal of Law, Property and Society* 1 6.

set up tents at the square and remain on the property overnight as part of their protest.[13]

Based on the analysis above, actions typically associated with gatherings include entry onto privately owned property, the occupation of privately owned property, interfering with the use and enjoyment of property, disrupting traffic to and from such property, intimidating people who have entered or who wish to enter such property, and affecting the businesses closely related to such property. These actions could potentially cause a deprivation of property for purposes of section 25(1) of the Constitution.

4 3 3 The understanding of "deprivation" by the Constitutional Court

The understanding of deprivation in terms of section 25(1) has been considered by the Constitutional Court in various judgments. In *First National Bank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance ("First National Bank"),*[14] a lien was obtained by the Commissioner of the South African Revenue Services over several vehicles on the premises of Lauray Manufacturers CC, in terms of section 114 of the Customs and Excise Act 91 of 1964. The purpose of the lien was to obtain security for outstanding taxes owed by Lauray Manufacturers CC to the South African Revenue Services. One of such vehicles belonged to First National Bank, which had been leased to Lauray Manufacturers CC via an instalment sale agreement. First National Bank alleged, successfully, that section 114 of the Customs and Excise Act caused a deprivation of their property in conflict with section 25(1) of the Constitution. In this case, the court stated that "[i]n a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned."[15]

According to Van der Walt, this definition should mean that "deprivation" should be interpreted widely, so that it could include all the interferences envisaged by the

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[13] A Layard "Public space: Property, lines, interruptions" (2016) 2 *Journal of Law, Property and Society* 1 6.

[14] 2002 4 SA 768 (CC).

[15] *First National Bank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 57.

definition.[16] According to Roux, this wide definition would likely result in court's accepting "almost any"[17] interference with the use and enjoyment of property as a deprivation for purposes of section 25(1), which would thus focus the inquiry on the remainder of the requirements in section 25(1).[18]

Subsequently, the wide interpretation favoured by the court in *First National Bank*, was narrowed in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government & Housing in the Province of Gauteng* ("*Mkontwana*").[19] In this case, the parties before the court agreed that the necessary legislation (section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 and section 50(1)(a) of the Gauteng Local Government Ordinance 17 of 1939) caused a deprivation of property for purposes of section 25(1) of the Constitution. Despite this agreement by the parties, the court nonetheless formulated the following definition of "deprivation":

> "Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need be said than that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation."[20]

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[16] AJ van der Walt *Constitutional property law* 3 ed (2011) 204. See also T Roux "Property" in S Woolman & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 2013) ch 46 17-18, who argues that due to the wide interpretation of "deprivation", the inquiry as to whether there has been a deprivation for purposes of section 25(1) will have very little impact on the overall section 25(1) inquiry in future cases.

[17] T Roux "Property" in S Woolman & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 2013) ch 46 18. See also H Mostert & PJ Badenhorst "Property and the bill of rights" in Y Mokgoro & P Tlakula (eds) *Bill of rights compendium* (RS 2015) ch 3FB 41.

[18] T Roux "Property" in S Woolman & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 2013) ch 46 18.

[19] 2005 1 SA 530 (CC).

[20] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government & Housing in the Province of Gauteng* 2005 1 SA 530 (CC) para 32. See also the discussion in I Currie & J de Waal *The bill of rights handbook* 6 ed (2013) 538; H Mostert & PJ Badenhorst "Property and the bill of rights" in Y Mokgoro & P Tlakula (eds) *Bill of rights compendium* (RS 2015) ch 3FB 42.

Given this definition, it is clear that the court restricted the definition of a deprivation laid down by the court in *First National Bank*.[21] According to the definition of deprivation in *Mkontwana*, an interference with the use, enjoyment and exploitation of private property will only amount to a deprivation for purposes of section 25(1) of the Constitution if the interference has a significant impact.[22] According to Van der Walt, this interpretation clouded the meaning of "deprivation".[23] In his criticism of the *Mkontwana* judgment, he argues that although the court in this case professed to apply the interpretation of a "deprivation" established in *First National Bank*, it actually departed from it.[24]

In *Offit Enterprises (Pty) Ltd v Coega Development Corporation*,[25] the court accepted the definition of "deprivation" adopted by the court in *Mkontwana.* It stated that the impact of an interference needs to have "sufficient magnitude"[26] before section 25(1) is triggered. Determining the magnitude of the interference will require a context-sensitive approach,[27] and will depend on the duration and degree thereof.[28] The context in this case led the court to conclude that a mere threat of expropriation did not amount to a deprivation of property, because it did not affect the property owner's ability to use or exploit its property.[29]

The definition of a deprivation was further modified by the court in *National Credit Regulator v Opperman*.[30] In this case, the court held that an impact would be

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[21] AJ van der Walt *Constitutional property law* 3 ed (2011) 204.

[22] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government & Housing in the Province of Gauteng* 2005 1 SA 530 (CC) para 32.

[23] AJ van der Walt *Constitutional property law* 3 ed (2011) 204.

[24] AJ van der Walt *Constitutional property law* 3 ed (2011) 204.

[25] 2011 1 SA 293 (CC).

[26] *Offit Enterprises (Pty) Ltd v Coega Development Corporation* 2011 1 SA 293 (CC) para 41. See also I Currie & J de Waal *The bill of rights handbook* 6 ed (2013) 538.

[27] *Offit Enterprises (Pty) Ltd v Coega Development Corporation* 2011 1 SA 293 (CC) para 40.

[28] *The Treasure Chest v Tambuti Enterprises (Pty) Ltd* 1975 2 SA 738 (A) 748H. According to IM Rautenbach "Introduction to the bill of rights" in Y Mokgoro & P Tlakula (eds) *Bill of rights compendium* (RS 2015) ch 1A 195, the Constitutional Court has done little in determining the exact seriousness and degree of an interference before it triggers section 25(1) of the Constitution.

[29] *Offit Enterprises (Pty) Ltd v Coega Development Corporation* 2011 1 SA 293 (CC) para 43; 46.

[30] 2013 2 SA 1 (CC).

significant enough for the interference to amount to a deprivation if it has a legally relevant impact on the rights of the property interest holder.[31] This position was confirmed in *South African Diamond Producers Organisation v Minister of Minerals and Energy*,[32] in which the court held that an interference had to have a "legally relevant impact"[33] on the property owner for it to be considered substantial.

Based on the discussion above, a deprivation of property for purposes of section 25(1) of the Constitution at the very least involves the interference with the use, enjoyment or exploitation of property.[34] However, this interference may also need to have a significant impact on the rights of the property owner before it may be considered a deprivation for purposes of section 25(1) of the Constitution.[35] This significant impact could specifically require that it be legally relevant to the rights of the property owner before it can be considered significant.[36] Despite these discrepancies in the definition of a deprivation, the question of whether a deprivation of property occurs for purposes of section 25(1) of the Constitution would need to be decided on a case-by-case basis, and thus requires a context-sensitive analysis.[37]

4 3 4 Concluding remarks

In order for section 25(1) of the Constitution to apply, the Gatherings Act needs to permit a deprivation of property as envisaged by section 25(1) of the Constitution. In

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[31] *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) para 66.

[32] (CCT234/16) [2017] ZACC 26 (24 July 2017).

[33] *South African Diamond Producers Organisation v Minister of Minerals and Energy* (CCT234/16) [2017] ZACC 26 (24 July 2017) para 48.

[34] This accords with the definition of a deprivation in *First National Bank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 57.

[35] This accords with the definition of a deprivation in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government & Housing in the Province of Gauteng* 2005 1 SA 530 (CC) para 32.

[36] This accords with the definition of a deprivation in *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) para 66; *South African Diamond Producers Organisation v Minister of Minerals and Energy* (CCT234/16) [2017] ZACC 26 (24 July 2017) para 48.

[37] This accords with the findings in *Offit Enterprises (Pty) Ltd v Coega Development Corporation* 2011 1 SA 293 (CC) para 40.

other words, the property owner must be able to show that the conduct permitted by Gathering Act amounts to a deprivation of her property.

The Gatherings Act serves to temporarily suspend the ability of the property owner to use or enjoy her property. This suspension will be temporary, as it will only be for the duration of the gathering. This temporary suspension amounts to an interference of the property owner's ability to use or enjoy her property, which alone has a significant enough impact to affect her legal entitlements. The actions discussed in 4 3 2 above, which include the entry of a large number of people onto privately owned property,[38] disrupting pedestrian and vehicular traffic to and from such property,[39] intimidating people who have entered or who wish to enter such property,[40] occupying privately owned property for an indefinite period,[41] and affecting the businesses closely related to such property,[42] interfere with the ability of the property owner to use and enjoy her property. Should this interference occur under the auspices of the definition of a "gathering", then the mere presence of more than 15 people on the property, as required by the definition of a "gathering", would amount to an interference. This interference is significant enough to affect her legal entitlements, and thus qualifies as a deprivation for purposes of section 25(1) of the Constitution.

Based on the above discussion on the definition of a "deprivation", as well as the content of the Gatherings Act discussed in chapter 3, it is clear that the Gatherings Act permits an interference with the property rights of private property owners that may have a significant impact. Therefore, the Gatherings Act permits a deprivation of property for purposes of section 25(1) of the Constitution. Since the Gatherings Act permits a deprivation of property, it needs to be considered whether the deprivation

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[38] This was the case in *Fourways Mall (Pty) Ltd v South African Commercial Catering* 1999 3 SA 752 (W); *Growthpoint Properties Limited v South Africa Commercial Catering and Allied Workers Union (SACCAWU)* 2010 JDR 1015 (KZD); *Hotz v UCT* 2016 4 All SA 723 (SCA); the Paternoster Square case study. See also 4 3 2 above.

[39] This was the case in *Hotz v UCT* 2016 4 All SA 723 (SCA). See also 4 3 2 above.

[40] This was the case in *Fourways Mall (Pty) Ltd v South African Commercial Catering* 1999 3 SA 752 (W); *Growthpoint Properties Limited v South Africa Commercial Catering and Allied Workers Union (SACCAWU)* 2010 JDR 1015 (KZD). See also 4 3 2 above.

[41] This was the case with the Paternoster Square case study. See also 4 3 2 above.

[42] This was the case in *Fourways Mall (Pty) Ltd v South African Commercial Catering* 1999 3 SA 752 (W); *Growthpoint Properties Limited v South Africa Commercial Catering and Allied Workers Union (SACCAWU)* 2010 JDR 1015 (KZD). See also 4 3 2 above.

complies with the requirements for a valid deprivation in section 25(1) of the Constitution.

4 4 Circumstances in which a deprivation is consistent with section 25(1) of the Constitution

4 4 1 Overview

The requirements for a valid deprivation in terms of section 25(1) of the Constitution is two-fold. Firstly, the deprivation of property may not occur except in terms of law of general application. Secondly, section 25(1) requires that the law should not permit an arbitrary deprivation. While little has been written on the law of general application requirement in section 25,[43] the non-arbitrariness requirement was given content in *First National Bank.*[44] In this decision, the court held that a deprivation is arbitrary if it is procedurally unfair or if there is insufficient reason for such deprivation.[45] Should insufficient reason for the deprivation exist, the deprivation will be substantively arbitrary.[46]

4 4 2 The deprivation must occur in terms of law of general application

The deprivation of property envisaged by section 25(1) of the Constitution may not occur except in terms of law of general application. Van der Walt interprets the first requirement as amounting to an authorisation of the deprivation in terms of the particular law.[47] The law also needs to be clear, precise and accessible enough so that affected parties are able to understand the degree of their rights and duties.[48] An

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[43] AJ van der Walt "Property law in the constitutional democracy" (2017) 28 *Stellenbosch Law Review* 8 17. Although Van der Walt refers to the "law of general application" requirement in section 25(2) of the Constitution specifically, this argument can be extended to the "law of general application" requirement in section 25(1) of the Constitution.

[44] *First National Bank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.

[45] *First National Bank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 67.

[46] AJ van der Walt *Constitutional property law* 3 ed (2011) 245.

[47] AJ van der Walt *Constitutional property law* 3 ed (2011) 232.

[48] *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 47.

absence of such a law, or the absence of the general applicability of a particular law, means the first requirement would not be met, and the subsequent deprivation would not survive scrutiny under section 25(1). Furthermore, an Act of Parliament will typically qualify as being a law of general application.[49]

As stated above, the legislation authorising the deprivation is the Gatherings Act. The Act is an Act of Parliament, the text of which is readily available to those who are affected by its content. The Act applies generally, because its provisions are not solely applicable to certain individuals. Therefore, the Gatherings Act qualifies as law of general application for purposes of section 25(1) of the Constitution.

4 4 3 The deprivation may not be procedurally arbitrary

The first component of arbitrariness deals with procedural arbitrariness, which is a flexible concept dependent on the facts of each particular case.[50] The procedural arbitrariness of a deprivation will be in issue should the deprivation occur in terms of the Gatherings Act itself, or where the deprivation was dependent on administrative action authorised by the Gatherings Act. Van der Walt argues that procedural arbitrariness will only be determined in terms of section 25(1) of the Constitution when the Promotion of Administrative Justice Act 3 of 2000 ("PAJA")[51] "does not apply for some reason."[52]

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[49] See *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government & Housing in the Province of Gauteng* 2005 1 SA 530 (CC) para 83; S Woolman & H Botha "Limitations" in S Woolman & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 2013) ch 34 51.

[50] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government & Housing in the Province of Gauteng* 2005 1 SA 530 (CC) para 65. See also *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 40.

[51] The right to administrative justice is enshrined in section 33 of the Constitution, 1996. The Promotion of Administrative Justice Act 3 of 2000 gives effect to section 33, as envisaged by section 33(3). Section 3 of the Promotion of Administrative Justice Act 3 of 2000 deals with the procedural fairness of administrative action.

[52] AJ van der Walt "Procedurally arbitrary deprivation of property" (2012) 23 *Stellenbosch Law Review* 88 93.

According to Van der Sijde, the procedural arbitrariness of a deprivation may be challenged in terms of section 25(1) of the Constitution, as well as PAJA.[53] The subsidiarity principles formulated by the Constitution provide useful guidelines to determine whether procedural fairness should be challenged on the basis of section 25(1) of the Constitution, or on PAJA.[54] In terms of the subsidiarity principles, reliance should only be placed on PAJA when the deprivation is brought about by administrative action, rather than a legislative provision itself.[55] In other words, the subsidiarity principles dictates that in cases where a deprivation is caused by administrative action, reliance should be placed on PAJA, because it was enacted to give effect to section 33 of the Constitution.[56] Therefore, the provisions of PAJA may not be bypassed in favour of challenging the procedural arbitrariness of the deprivation in terms of section 25(1) of the Constitution.[57]

Roux argues for an approach that would have a similar effect to the position advanced by Van der Sijde. According to Roux, deprivations caused by administrative action will trigger section 33 of the Constitution, whereas deprivations caused directly by a law of general application will trigger section 25(1) of the Constitution.[58] This is clear from the wording of the respective sections, as section 33 deals with

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[53] E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch (2015) 123.

[54] E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch (2015) 123. The principle of subsidiarity dictates that legislation giving effect to a particular constitutional right needs to be invoked before relying on the right directly. Only in cases where the legislation fails to give effect to the right, should the right be relied upon directly. See also *South African National Defence Union v Minister of Defence* 2007 8 BCLR 863 (CC) para 51 in which the court noted that legislation giving effect to a constitutional right may not be bypassed by relying directly on the Constitution; P de Vos & W Freedman (eds) *South African constitutional law in context* (2014) 586.

[55] E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch (2015) 123.

[56] E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch (2015) 123.

[57] E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch (2015) 123.

[58] T Roux “Property” in S Woolman & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 2013) ch 46 25. See also E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch (2015) 125.

administrative action, while section 25(1) deals with a law of general application.[59] As a result, there will be no overlap in cases where a litigant may need to decide whether to challenge a deprivation in terms of section 25(1) of the Constitution or in terms of PAJA.[60]

PAJA will thus only be applicable when the deprivation of property is dependent on administrative action authorised by the Gatherings Act. In cases where the deprivation is not brought about by administrative action, but rather caused directly by a law of general application, the procedural arbitrariness of the deprivation should be challenged in terms of section 25(1) of the Constitution.[61] Despite the different litigation routes followed, the principles used to assess procedural arbitrariness will be the same for reliance on both PAJA and section 25(1) of the Constitution.[62] These principles indicate that the deprivation caused by the Gatherings Act is not dependent on administrative action, and the procedural arbitrariness of the deprivation would thus be adjudicated in terms of section 25(1) of the Constitution. However, there are limited circumstances in which the deprivation caused by the Gatherings Act could be brought about by administrative action. This would occur in cases where the responsible officer permits a gathering to proceed even though grounds exist for the prohibition of the gathering in terms of section 5(1) of the Gatherings Act.[63] The responsible officer may

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[59] T Roux "Property" in S Woolman & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 2013) ch 46 25. See also E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch (2015) 125.

[60] T Roux "Property" in S Woolman & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 2013) ch 46 25. See also E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch (2015) 125.

[61] E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch (2015) 124.

[62] E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch (2015) 125.

[63] Section 5(1) of the Regulation of Gatherings Act 205 of 1993 states:

> "(1) When credible information on oath is brought to the attention of a responsible officer that there is a threat that a proposed gathering will result in serious disruption of vehicular or pedestrian traffic, injury to participants in the gathering or other persons, or extensive damage to property, and that the Police and the traffic officers in question will not be able to contain this threat, he shall forthwith meet or, if time does not allow it, consult with the convener and the authorized member, if possible, and any other person with whom, he believes, he should meet or consult, including the representatives of any police community consultative forum in order to consider the prohibition of the gathering."

only prohibit a gathering in terms of section 5(2) of the Gatherings Act if one of the grounds in section 5(1) exists, and failure to prohibit the gathering would thus amount to a failure to make a decision for purposes of PAJA.[64] In such a case, the action taken by the administrator would need to be tested against the principles of procedural fairness under administrative law.[65] In this regard, the procedure followed by the responsible officer in deciding not to prohibit a gathering will be tested against the procedures in the Gatherings Act, in order to determine whether the deprivation is procedurally unfair.[66] Although this creates some interesting questions for discussion, it remains beyond the scope of this thesis. Instead, this thesis will only focus on deprivations caused directly by the Gatherings Act itself, and not by administrative action authorised by the Gatherings Act.

According to Van der Walt, the principles of procedural fairness in administrative law should be used when legislation directly brings about a deprivation of property, even though no administrative decision was made.[67] In terms of these principles, the deprivation would only be procedurally fair when the legislation in question provides for judicial oversight,[68] because this would effectively grant the property owner the opportunity to be heard.[69] Furthermore, the court in *Chevron SA (Pty) Limited v Wilson*

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[64] According to section 1 of PAJA, administrative action includes the failure to make a decision. The decision not to prohibit a gathering will be made when the notice of the gathering is made public in terms of section 4(5)(a) of the Gatherings Act.

[65] See C Hoexter *Administrative law in South Africa* 2 ed (2012) 368, in which she argues that section 3(5) of PAJA recognises that procedures in the empowering provision may differ from the procedures in PAJA, and will survive constitutional scrutiny if it is deemed to be fair. See further *Minister of Defence and Military Veterans v Motau* 2014 8 BCLR 930 (CC), in which the Minister failed to follow the prescribed procedures in sections 71(1) and (2) of the Companies Act 71 of 2008, and thus deemed the administrative action taken procedurally unfair.

[66] These procedures include those in section 5 of the Gatherings Act, as well as the review and appeal procedures in section 6 of the Gatherings Act. These procedures are consistent with the procedural fairness requirements in section 3(2)(b) of PAJA. See further C Hoexter *Administrative law in South Africa* 2 ed (2012) 366-368.

[67] AJ van der Walt *Constitutional property law* 3 ed (2011) 269.

[68] AJ van der Walt *Constitutional property law* 3 ed (2011) 270.

[69] In *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) para 112, the court held that persons affected by an administrative decision should be given the opportunity to make representations before the decision is made. C Hoexter *Administrative law in South Africa* 2 ed (2012) 363 argues that people should be given the opportunity to

t/a Wilson's Transport ("*Chevron*"),[70] further qualified the requirement for the provision of judicial oversight, by stating that the law permitting the deprivation may not strip the court of its discretion. In this case, the court held that section 89(5)(b) of the National Credit Act 34 of 2005 caused a procedurally arbitrary deprivation of property because the provision obliged courts to order the repayment of money paid in terms of an invalid agreement envisaged by section 89.[71] If these principles are tested against the deprivation permitted by the Gatherings Act, it would require the Act to provide for judicial oversight, which does not strip the judiciary from exercising its discretionary powers. Section 6(5) of the Gatherings Act provides the necessary judicial oversight, because it grants any interested party the power to approach a court to challenge the approval or prohibition of a gathering, or any conditions placed on a gathering.[72] This provision can be used by the property owner to challenge the commencement of the gathering on her property, and will thus satisfy the administrative law requirement that all parties are given the opportunity to be heard.[73] Furthermore, section 6(5) states that the court may amend, strike out, or impose additional conditions, or approve or prohibit a gathering "as it deems fit". Based on these provisions, it is clear that the Gatherings Act grants the property owner the opportunity to be heard, by providing for judicial oversight. Furthermore, these provisions do not limit the court's discretion, and can thus not be interpreted as being procedurally arbitrary in terms of the *Chevron* principle.

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influence decisions that may affect them by granting them the power to participate in those decisions. See further J Klaaren & G Penfold "Just administrative action" in S Woolman & M Chaskalson (eds) *Constitutional law of South Africa* 2 ed (OS 2005) ch 63 81.

[70] 2015 10 BCLR 1158 (CC).

[71] *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport* 2015 10 BCLR 1158 (CC) paras 10; 24.

[72] The responsible officer may approve a gathering in terms of section 4(2)(a) or section 4(4)(a) of the Regulation of Gatherings Act 205 of 1993, or prohibit a gathering in terms of section 5(2) of the Regulation of Gatherings Act 205 of 1993.

[73] C Hoexter *Administrative law in South Africa* 2 ed (2012) 363.

4 4 4 The deprivation may not be substantively arbitrary

4 4 4 1 Overview

The second component of arbitrariness deals with substantive arbitrariness, and requires that sufficient reason be given for the deprivation.[74] In *First National Bank*, the court stated that the test for substantive arbitrariness may range from a rationality to a proportionality test.[75] In this regard, the court stated that the substantive non-arbitrariness test may only require rationality to be established, but will sometimes also require proportionality similar to the test in section 36(1) of the Constitution to be established. In this case, a proportionality test seemed to be favoured, as the court listed factors to be taken into account when considering if the reasons for the deprivation are sufficient. These factors included the means sought to give effect to the law in question, the link between the purpose of the deprivation and those affected by it, and the need to consider the complexity of relationships involved.[76] This part of the chapter will focus on establishing what could amount to "sufficient reason" for the deprivation caused by the Gatherings Act. In this regard, the courts could consider three factors when establishing whether "sufficient reason" exists.

4 4 4 2 "Sufficient reason" in the Gatherings Act itself

In some cases, legislation may provide reasons for a deprivation.[77] Based on the requirements for holding a lawful gathering in terms of the Gatherings Act, it is clear

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[74] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.

[75] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.

[76] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.

[77] According to P Dhliwayo *a constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch (2015) 183-184, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which gives effect to section 9 of the Constitution, provides reasons for the limitation of the owners' right to exclude. In other words, the legislation permitting the deprivation provides sufficient reason for the deprivation. Dhliwayo argues at page 174 that the purpose of a limitation on an owners' right to exclude

that the commencement of a "gathering" on privately owned property does not depend on the consideration of the constitutional rights exercised during a gathering, as well as the need to hold a gathering on privately owned property. In other words, at no point does the definition of a gathering, or the procedures immediately before the commencement of a gathering, take the interests of the property owner into account. Had the Gatherings Act provided for the consideration of such interests, and permitted the gathering to commence anyway, the property owner would have to attack the legislation on the basis that it causes an arbitrary deprivation of property.

Therefore, merely meeting the definition of a gathering and adhering to the requirement procedures in sections 2, 3 and 4 of the Gatherings Act is sufficient for a lawful gathering to commence, none of which take the above considerations into account. While the Gatherings Act prohibits certain gatherings, it can only be prohibited based on one of the grounds listed in section 5(1).[78] These grounds also do not seem to take the above considerations into account when determining whether a gathering should be prohibited outright. As a result, it is evident that the Gatherings Act provides no reason why a "gathering" may be held on privately owned property.

Therefore, the determination of whether the Gatherings Act permits a substantively arbitrary deprivation will need to be decided on a case-by-case basis. This will require the consideration of "sufficient reason" outside the confines of the Gatherings Act itself.

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caused by the legislation, will appear in the legislation itself. In some cases, the legislation may even perform the balancing of conflicting rights, and will offer guidance on how the conflict should be resolved. Therefore, the reasons for a deprivation that limits the owners' right to exclude is often found in the legislation itself.

[78] Section 5(1) of the Regulation of Gatherings Act 205 of 1993 states:

> "(1) When credible information on oath is brought to the attention of a responsible officer that there is a threat that a proposed gathering will result in serious disruption of vehicular or pedestrian traffic, injury to participants in the gathering or other persons, or extensive damage to property, and that the Police and the traffic officers in question will not be able to contain this threat, he shall forthwith meet or, if time does not allow it, consult with the convener and the authorized member, if possible, and any other person with whom, he believes, he should meet or consult, including the representatives of any police community consultative forum in order to consider the prohibition of the gathering."

See also 4 4 3 above.

4 4 4 3 Complexity of constitutional rights involved

One of the reasons why the Gatherings Act may permit a deprivation of property could be due to the magnitude and complexity of constitutional rights that are typically exercised during a gathering. The importance of these rights, particularly when they come into conflict with property rights, will be central in determining whether sufficient reason exists to justify the commencement of a gathering on privately owned property. This complexity of constitutional rights was outlined by Wallis JA in *Hotz v UCT*:

> "…[T]he right to protest against injustice is one that is protected under our Constitution, not only specifically in section 17, by way of the right to assemble, demonstrate and present petitions, but also by other constitutionally protected rights, such as the right of freedom of opinion (s 15(1)); the right of freedom of expression (s 16(1)); the right of freedom of association (s 18) and the right to make political choices and campaign for a political cause (s 19(1))."[79]

Based on this remark, it is clear that the participants of a gathering may be exercising a combination of any of the above constitutional rights throughout the duration of the gathering. While all of these rights are important, the emphasis here will fall on the importance of the right to assemble and demonstrate, as well as the right to freedom of expression. The first of these rights is entrenched in section 17 of the Constitution, which states that "[e]veryone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."[80]

In some cases, the right to assemble and demonstrate may come into conflict with other constitutional rights, which would require an evaluation of the importance of the recognition and protection of the right to assemble and demonstrate. The importance of the recognition and protection of the right to assemble and demonstrate is five-fold. Firstly, the importance relates to the historical context of South Africa, and the need to "channel the violence inherent in mass action into a less dangerous and perhaps even constructive form".[81] It is in this sense that the constitutional protection of the right to assemble and demonstrate is necessary, because it helps avoid the manner in which

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[79] *Hotz v UCT* 2016 4 All SA 723 (SCA) para 62.

[80] Section 17 of the Constitution of the Republic of South Africa, 1996.

[81] S Woolman "Assembly, demonstration and petition" in I Currie & J de Waal (eds) *The bill of rights handbook* 6 ed (2013) 377 385.

legislation was used to suppress these rights under the apartheid regime.[82] Woolman and De Waal argue that these statutes not only showed how local authorities and the national government displayed disinterest in the importance of the right to assemble, but also how these institutions "demonstrated even less sympathy for assemblers."[83] When the judiciary had to interpret the legislation that regulated and effectively suppressed gatherings, they failed to consider the political context in which the assemblies took place.[84] These arguments indicate that a need exists to recognise the right to assemble and demonstrate in terms of the Constitution. This need arises not only from the repressive nature of the state towards dissent, but also from the need to find solutions to problems raised during gatherings, without resorting to violence.

Secondly, the importance of the right to assemble and demonstrate when it comes into conflict with other constitutional rights, lies in the need to promote government accountability, as well as the ability of the people to do so in a society based on a constitutional democracy. According to Woolman, this is reflected in the need to "create space for the large, vocal social formations that service representative democracies",[85] the need to "supplement representative democracy through a form of direct democracy"[86] and the need to "improve government accountability and responsiveness between elections".[87] These grounds are central to the recognition of the right to assemble and demonstrate in terms of section 17 of the Constitution, which

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[82] These statutes include, *inter alia*, the Suppression of Communism Act 44 of 1950, which granted the Minister of Justice the power to prohibit a gathering if he was of the opinion that it would involve the advancement of a communist agenda; the Criminal Law Amendment Act 8 of 1953, which imposed harsher penalties on perpetrators involved in political protests; the Riotous Assemblies Act 17 of 1956, which granted the Minister of Justice the power to prohibit a gathering should it be in the interest of maintaining peace or preventing racial hostility. See also 2 2 2 above.

[83] S Woolman & J de Waal "Voting with your feet" in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and constitutionalism – The new South African legal order* (1994) 292 292.

[84] S Woolman & J de Waal "Voting with your feet" in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and constitutionalism – The new South African legal order* (1994) 292 293. See also 2 2 2 above.

[85] S Woolman "Assembly, demonstration and petition" in I Currie & J de Waal (eds) *The bill of rights handbook* 6 ed (2013) 377 385.

[86] S Woolman "Assembly, demonstration and petition" in I Currie & J de Waal (eds) *The bill of rights handbook* 6 ed (2013) 377 385.

[87] S Woolman "Assembly, demonstration and petition" in I Currie & J de Waal (eds) *The bill of rights handbook* 6 ed (2013) 377 385.

grants the people the power to express their will through a channel other than those offered by political parties and the state.[88] Section 17 allows the people to put pressure on the state for failing to fulfil the promises contained in section 1 of the Constitution, and to hold elected officials accountable.[89] This accords with the argument by Dugard, who argues that denying someone the right to public assembly is undemocratic.[90] The denial of this right is often aimed at those who operate outside the structures offered by political parties, and will likely be met with creative forms of resistance.[91] Therefore, it is clear that the need for the recognition of a right to assemble and demonstrate is necessary for the effective functioning of a democracy in which people are able to express their dissent freely. Similarly, in *S v Mamabolo*,[92] the court stated that various rights, including the right to assemble and demonstrate, promote a freedom to "speak one's mind"[93] and participate in the everyday activities of society. Furthermore, in *South African Transport and Allied Workers Union v Garvas*,[94] the Constitutional Court found that all forms of public assembly have become part of the South African society.[95] These assemblies are central to a democratic society, in which they are used as an instrument through which dialogue is encouraged.[96] This seeks to frame the right to assemble and demonstrate around the concept of democracy. It also reaffirms the views above by linking the right to assemble and demonstrate to the idea of government accountability. In this regard, the instruments of dialogue referred to above can operate as a catalyst for bringing about demands made by participants in a gathering, which are essential for justice and democracy.[97] Therefore, it is clear that the recognition of the right to assemble and demonstrate are essential in a

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[88] S Woolman "My tea party, your mob, our social contract: Freedom of assembly and the constitutional right to rebellion in *Garvis v SATAWU* (*Minister for Safety & Security, Third Party*) 2010 (6) SA 280 (WCC)" (2011) 27 *South African Journal on Human Rights* 346 348.

[89] S Woolman "My tea party, your mob, our social contract: Freedom of assembly and the constitutional right to rebellion in *Garvis v SATAWU* (*Minister for Safety & Security, Third Party*) 2010 (6) SA 280 (WCC)" (2011) 27 *South African Journal on Human Rights* 346 348.

[90] J Dugard *Human rights and the South African legal order* (1978) 186-187.

[91] J Dugard *Human rights and the South African legal order* (1978) 186-187.

[92] 2001 3 SA 409 (CC).

[93] *S v Mamabolo* 2001 3 SA 409 (CC) para 28.

[94] 2013 1 SA 83 (CC).

[95] *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) para 68.

[96] *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) para 68.

[97] A Branch & Z Mampilly *Africa uprising: Popular protest and political change* (2015) 4.

constitutional democracy as a means of holding the state accountable. Exercising the right to assemble and demonstrate thus serves as a means of holding those in power to account.

Thirdly, the importance of the right to assemble and demonstrate when it comes into conflict with other constitutional rights, lies in the need to stimulate public debate. According to Woolman, the recognition of the right is necessary in order to "create space for the large, vocal social formations that service representative democracies",[98] while acting as a "catalyst for debate".[99] The first of these grounds, namely the need to create public spaces for the benefit of advancing democracy, are often adopted in a vocal manner. According to Dlamini,[100] encouraging debate will not only assist in developing the public discourse, but also play a vital role in "consolidating and deepening democracy."[101] Wessels argues that it not only allows people to participate in public debate, but also has the potential to unite people from different political affiliations.[102] According to Botha, the purpose of protests is not only to disrupt or create inconvenience, but also to gain support from the public at large.[103] By bringing the public into close contact with the views expressed, attention and discussion is stimulated.[104] While protests may take different forms depending on the participants, their demands and their affiliations,[105] they are often performed through "loud, noisy, disruptive, and sometimes dangerous"[106] behaviour. Therefore, the action of protest

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[98] S Woolman "Assembly, demonstration and petition" in I Currie & J de Waal (eds) *The bill of rights handbook* 6 ed (2013) 377 385.

[99] S Woolman "Assembly, demonstration and petition" in I Currie & J de Waal (eds) *The bill of rights handbook* 6 ed (2013) 377 385.

[100] Q Dlamini "Mass action and the law: Can South Africa do without the Regulation of Gatherings Act?" (2009) 1 *African Journal of Rhetoric* 86 89-90.

[101] Q Dlamini "Mass action and the law: Can South Africa do without the Regulation of Gatherings Act?" (2009) 1 *African Journal of Rhetoric* 86 90.

[102] L Wessels *My rights! Your rights? Let's talk!* (2007)183.

[103] H Botha "Fundamental rights and democratic dissent: Reflections on freedom of assembly in the 'protest capital of the world'" Paper presented at third bi-annual German-South African dialogue on democracy entitled *The preconditions of democracy* (2016) The University of the Western Cape (Copy of paper on file with author).

[104] *In Re Munhumeso* 1995 1 SA 551 (ZS) 557.

[105] A Branch & Z Mampilly *Africa uprising: Popular protest and political change* (2015) 4.

[106] S Woolman "My tea party, your mob, our social contract: Freedom of assembly and the constitutional right to rebellion in *Garvis v SATAWU* (*Minister for Safety & Security, Third Party*) 2010 (6) SA 280 (WCC)" (2011) 27 *South African Journal on Human Rights* 346 348.

itself should be viewed as "a direct expression of popular sovereignty, and if so, as a direct challenge to the status quo."[107] In this regard, the importance of protest should not only be viewed as a means of action and dissent, but also as a means of gaining public support. While these views hold that expression and assembly are often linked during public debate, Botha warns that these two rights should be viewed independently from each other when they are invoked during such debates.[108] He warns against bundling these two rights together when protests occur, because more weight is often attached to the right to freedom of expression than to the right to assemble.[109] His views are based on the fact that action and assembly have symbolic value, and should thus be viewed independently from expression.[110] Although they should be viewed independently, the existence of a link between these two rights is undeniable, because some rights in the Constitution "could not be struggled for and realised without the right to free expression [and] assembly".[111] Therefore, by assessing these views, it is evident that the recognition of a right to assemble and demonstrate is important for the stimulation of public debate. In other words, recognising the right to assemble and demonstrate not only encourages the need to partake in debates, but also the need to do so publicly.

Fourthly, the importance of the right to assemble and demonstrate when it comes into conflict with other constitutional rights lies in the need to give a voice to the

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[107] S Woolman "My tea party, your mob, our social contract: Freedom of assembly and the constitutional right to rebellion in *Garvis v SATAWU* (*Minister for Safety & Security, Third Party*) 2010 (6) SA 280 (WCC)" (2011) 27 *South African Journal on Human Rights* 346 348.

[108] H Botha "Fundamental rights and democratic dissent: Reflections on freedom of assembly in the 'protest capital of the world'" Paper presented at third bi-annual German-South African dialogue on democracy entitled *The preconditions of democracy* (2016) The University of the Western Cape (Copy of paper on file with author). The right to freedom of expression is protected in section 16 of the Constitution, 1996.

[109] H Botha "Fundamental rights and democratic dissent: Reflections on freedom of assembly in the 'protest capital of the world'" Paper presented at third bi-annual German-South African dialogue on democracy entitled *The preconditions of democracy* (2016) The University of the Western Cape (Copy of paper on file with author).

[110] H Botha "Fundamental rights and democratic dissent: Reflections on freedom of assembly in the 'protest capital of the world'" Paper presented at third bi-annual German-South African dialogue on democracy entitled *The preconditions of democracy* (2016) The University of the Western Cape (Copy of paper on file with author).

[111] J van der Westhuizen "Freedom of expression" in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and constitutionalism – The new South African legal order* (1994) 264 270.

voiceless. According to Woolman, the importance of the recognition of the right includes the need to "empower out-groups",[112] as well as the need to "enhance the stability and the legitimacy of the political processes by allowing for the articulation of minority views".[113] He argues that different degrees of power held by different groups of people has often led to one-sided discourse, and the right to freedom of assembly has forced society to confront this reality.[114] Botha argues that views expressed during protests are often not the views of someone who has the power to express these views in any other setting.[115] This, he states, is usually the case where the poor or marginalised are forced to do something to change the oppressive circumstances they find themselves in.[116] Freedom of assembly grants such people the scope to create their own "deliberative structures"[117] in spaces of their own design.[118] Gargarella offers a similar view on the rights of the poor, oppressed and marginalised.[119] He refers to what he deems a right of resistance, particularly in instances where people are

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[112] S Woolman "Assembly, demonstration and petition" in I Currie & J de Waal (eds) *The bill of rights handbook* 6 ed (2013) 377 385.

[113] S Woolman "Assembly, demonstration and petition" in I Currie & J de Waal (eds) *The bill of rights handbook* 6 ed (2013) 377 385.

[114] S Woolman "Freedom of assembly" in S Woolman & M Chaskalson (eds) *Constitutional law of South Africa* 2 ed (OS 2005) ch 43 2.

[115] H Botha "Fundamental rights and democratic dissent: Reflections on freedom of assembly in the 'protest capital of the world'" Paper presented at third bi-annual German-South African dialogue on democracy entitled *The preconditions of democracy* (2016) The University of the Western Cape (Copy of paper on file with author).

[116] H Botha "Fundamental rights and democratic dissent: Reflections on freedom of assembly in the 'protest capital of the world'" Paper presented at third bi-annual German-South African dialogue on democracy entitled *The preconditions of democracy* (2016) The University of the Western Cape (Copy of paper on file with author).

[117] W le Roux "Between a brick and a ballot? Rethinking the relationship between disruptive and deliberative democracy" Paper presented at *Rethinking the encounter with the police: From Marikana to Ferguson* (2017) The University of the Western Cape (Copy of paper on file with author).

[118] H Botha "Fundamental rights and democratic dissent: Reflections on freedom of assembly in the 'protest capital of the world'" Paper presented at third bi-annual German-South African dialogue on democracy entitled *The preconditions of democracy* (2016) The University of the Western Cape (Copy of paper on file with author).

[119] R Gargarella "The right of resistance in situations of severe deprivation" in T Pogge (ed) *Freedom from poverty as a human right* (2007) 359 370.

suffering from severe deprivation, in whichever form it may take place.[120] While he argues that such persons should resist and defy any legal prohibitions that further reinforces their deprivation, he also mentions that non-traditional forms of protest such as the occupation of unused land, as well as the blocking of highways, should be used as a form of resistance.[121] Therefore, the need to recognise the right to assemble and demonstrate could be grounded on the fact that it allows minority views to be heard. As discussed above, these views are often those of the powerless, which further reiterates the need to uphold the right when it comes into conflict with property rights.

Lastly, the recognition and protection of the right to assemble and demonstrate in international law displays the manner in which this right is treated internationally. The protection of the right can be found in various international instruments.[122] For example, article 20(1) of the Universal Declaration of Human Rights states that "everyone has the right to freedom of peaceful assembly and association."[123] Extensive protection is also afforded by article 21 of the International Covenant on Civil and Political Rights,[124] as well as article 11 of the African Charter on Human and

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[120] R Gargarella "The right of resistance in situations of severe deprivation" in T Pogge (ed) *Freedom from poverty as a human right* (2007) 359 370.

[121] This right of resistance is similar to article 20(2) of the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217. This article states that "[c]olonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community." According to S Murphy "Unique in international human rights law: Article 20(2) and the right to resist in the African Charter on Human and Peoples' Rights" (2011) 11 *African Human Rights Law Journal* 465 492, article 20(2) recognises a right to resist. However, it should only be invoked in circumstances where domestic law fails to sufficiently protect the right to freedom of assembly, expression and association. In other words, the right to resist as envisaged by Article 20(2) would usually fall outside the confines of ordinary domestic law.

[122] The position of international law in the South African legal system is provided for in section 231 of the Constitution. Section 233 of the Constitution further compels courts to make findings consistent with international law. Furthermore, section 39(1)(b) of the Constitution requires courts to consider international law when interpreting the Bill of Rights.

[123] UNGA Res 217 (III) (Adopted 10 December 1948). This document is not a treaty in itself, and does not require the signature or ratification by member nations. When the document was passed by the United Nations General Assembly, South Africa abstained from the vote.

[124] 999 UNTS 171 (Adopted 16 December 1966, entered into force 3 January 1976). South Africa signed this agreement on 3 October 1994. South Africa subsequently ratified the agreement on 10 December 1998. Article 21 states:

Peoples' Rights.[125] The significant protection of the right to assemble and demonstrate under international law further solidifies the extensive protection of the right afforded under South African law.

Apart from the right contained in section 17 of the Constitution, the right to freedom of expression is also often exercised during a gathering. The right to freedom of expression is entrenched in section 16 of the Constitution, which does not extend to forms of expression that involve propaganda for war, hate speech and the incitement of imminent violence.[126] The entrenchment of this right, and the magnitude of the protection it enjoys under the Constitution, contrasts with the lack of protection it received before the advent of democracy. The position during apartheid was mentioned in *Islamic Unity Convention v The Independent Broadcasting Authority*.[127] In this case, Langa DCJ concluded that the heavy restrictions on political and artistic expression during apartheid amounted to a "denial of democracy".[128] This denial was a cause for concern because the right to freedom of expression today is considered to be "the lifeblood of an open and democratic society cherished by our Constitution."[129] The functioning of the South African democracy was thus dependent on the right to freedom of expression being recognised and protected. Therefore, any denial of the right to freedom of expression would be to the detriment of the existence and advancement of a democratic society.

> "The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

[125] 1520 UNTS 217 (Adopted 27 June 1981, entered into force 21 October 1986). South Africa signed this agreement on 9 June 1986. South Africa subsequently ratified the agreement on 9 June 1996. Article 11 states:

> "Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others."

[126] Section 16 of the Constitution of the Republic of South Africa, 1996.

[127] 2002 4 SA 294 (CC).

[128] *Islamic Unity Convention v The Independent Broadcasting Authority* 2002 4 SA 294 (CC) para 27. In this case, Langa DCJ compared the contrasting right of freedom of expression recognised in common law to the restrictive artistic and political rights of expression experienced under the oppressive apartheid government.

[129] *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 92.

Since the adoption of the Constitution of the Republic of South Africa Act 200 of 1993, the protection afforded to the right to freedom of expression changed significantly. The ability for people to express themselves freely had moved from being heavily restricted and limited to being a right "zealously guarded"[130] by way of the Constitution. In *South African National Defence Union v Minister of Defence,*[131] O'Regan J stated that this formerly limited right now serves to act as a "guarantor of democracy" as a result of its entrenchment in the Bill of Rights.[132]

The views on the importance of the protection of the right to freedom of expression are not unique to South Africa. The protection of the right is recognised in foreign jurisdictions through domestic laws, globally through international law, and universally through the work of academics. For example, article 19 of the Universal Declaration of Human Rights,[133] article 19(2) of the International Covenant on Civil and Political Rights,[134] as well as article 9 of the African Charter on Human and Peoples' Rights,[135]

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[130] *Philips v the Director of Public Prosecutions* 2003 4 BCLR 357 (CC) para 23.

[131] 1999 6 BCLR 615 (CC).

[132] In *South African National Defence Union v Minister of Defence* 1999 6 BCLR 615 (CC) para 7, O'Regan J stated that freedom of expression needs to be protected to ensure that the search for truth and self-fulfilment is upheld. See also L Johannessen "Freedom of expression and information in the new South African constitution and its compatibility with international standards" (1994) 10 *South African Journal on Human Rights* 216 218, who argues that the protection of free expression is essential in seeking and attaining the truth, encouraging participation in social and political decision-making and recognising the diversity of individuals, and allowing them to achieve self-fulfilment. See further E Neisser "Hate speech in the new South Africa: Constitutional considerations for a land recovering from decades of racial repression and violence" (1994) 5 *Seton Hall Constitutional Law Journal* 103 117, who adds that the protection of this right also serves to maintain stability in society.

[133] UNGA Res 217 (III) (Adopted 10 December 1948). Article 19 states that "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

[134] 999 UNTS 171 (Adopted 16 December 1966, entered into force 3 January 1976). Article 19(2) states that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

[135] 1520 UNTS 217 (Adopted 27 June 1981, entered into force 21 October 1986). Article 9(2) states that "[e]very individual shall have the right to express and disseminate his opinions within the law."

recognise and protect the right to freedom of expression. Furthermore, the value of international recognition of the right to freedom of expression was the subject of a work by Indian writer Sorabjee, who referred to the protection of the right in a third-world country.[136] He described how freedom of expression should be seen as a means to an end, rather than an end in itself. The means to the end, he states, would involve the perpetuation of a community in which respect for human rights is advanced and the rule of law is respected and upheld. [137]

The importance of the right to assemble and demonstrate, as well as the right to freedom of expression, as discussed above, is illustrated by the German Federal Constitutional Court decision in *Fraport*.[138] In this case, the complainants were banned from accessing parts of an airport to exercise their rights to demonstrate and freedom of expression without the permission of the stock corporation who owned and operated the airport. This ban was upheld by the Frankfurt am Main Regional Court as well as the Frankfurt am Local Court. On appeal to the Federal Constitutional Court, the court considered the property rights of the respondent, as well as the rights of the complainant to freedom of assembly and freedom of expression. The court held that proportionality requires a limitation on the rights to freedom of assembly and freedom of expression to have a legitimate purpose.[139] This limitation was not confined to the airport's right to undisturbed possession of property in private law, but required something more.[140] Instead, reliance on the owners' right to undisturbed possession can only be justified when it serves the public good, which includes due regard being given to the importance of the right to freedom of assembly and freedom of expression. This case illustrates that when the exercise of constitutional rights are the cause of a disturbance of the property owner's rights to undisturbed possession, the owner cannot merely rely on her right to undisturbed possession of her property to exclude those exercising their constitutional rights on the property. Furthermore, the court held that the limitation on the owner's rights to undisturbed possession would also depend on the access the property owner grants the public to their property. The court stated that where access to property is granted to the public for specific purposes, or to which

[136] SJ Sorabjee "Hate speech dilemma" (1993) 318 *Fortnight* 27 27.
[137] SJ Sorabjee "Hate speech dilemma" (1993) 318 *Fortnight* 27 27.
[138] *BVerfGE* 128, 226 (2011), *Fraport*.
[139] *BVerfGE* 128, 226 (2011), *Fraport* para 86.
[140] *BVerfGE* 128, 226 (2011), *Fraport* para 86.

the public has no general access (such as places where airline passengers board and de-board or check in their luggage), the right to freedom of assembly and freedom of expression cannot extend to the exercise thereof in such places,[141] but is only limited to places to which the public has general access.[142]

4 4 4 4 Proximity of gathering to privately owned property and the related relationships involved

In some cases, there may be a need to hold a gathering on privately owned property for it to have its desired effect. Depending on the circumstances, close proximity could range from holding the gathering near privately owned property to holding the gathering on privately owned property. Allowing the gathering to commence in close proximity to the property in question would effectively allow participants to exercise their right to freedom of expression, and ensure that the intended recipient of their views are able to receive these views.

Firstly, in the context of the "privatisation of public spaces"[143] such as shopping malls, Woolman argues that when protests are directed at a particular business owner, it is necessary for it to take place within close range of the business to have any effect.[144] This notion, he states, is displayed through the regulation of picketing in section 69 of the Labour Relations Act 66 of 1995. This provision grants members of a trade union to picket in "any place to which the public has access but outside the premises of an employer",[145] which Woolman argues extends to privately owned places such as shopping malls.[146] The provision goes further by allowing the picket to take place on the premises of the employer, provided permission is granted by the employer.[147] His argument indicates that the necessity of exercising certain rights on

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[141] *BVerfGE* 128, 226 (2011), *Fraport* para 65.

[142] See also 3 3 3 3 above.

[143] S Woolman "Assembly, demonstration and petition" in I Currie & J de Waal (eds) *The bill of rights handbook* 6 ed (2013) 377 388.

[144] S Woolman "Assembly, demonstration and petition" in I Currie & J de Waal (eds) *The bill of rights handbook* 6 ed (2013) 377 388.

[145] Section 69(2)(a) of the Labour Relations Act.

[146] S Woolman "Assembly, demonstration and petition" in I Currie & J de Waal (eds) *The bill of rights handbook* 6 ed (2013) 377 389.

[147] Section 69(2)(b) of the Labour Relations Act 66 of 1995.

privately owned property is already recognised through legislation. His argument also raises the question whether such necessity should extend to gatherings in terms of the Gatherings Act. This question can be answered with reference to chapter 3, in which it was concluded that the Gatherings Act does not apply to areas inside the walls of a building, such as shopping malls.[148] Therefore, although the Labour Relations Act permits picketing inside the walls of a building, such as shopping malls, the Gatherings Act does not permit gatherings inside the walls of buildings.[149]

Secondly, the need to hold a gathering in close proximity to privately owned property stems from the access granted to the public to such property. In situations where owners grant access to their property to the public, they can no longer blindly rely on their property rights to the exclusion of others, without due regard to the rights of those on their property. While this issue has not been considered in South African law, a number of cases in the United States demonstrates the importance of holding a gathering on privately owned property. In *Marsh v Alabama*,[150] the court held that the circumscription of a property owner's rights are directly related to the magnitude of access granted to the public.[151] In other words, the rights of the property owner to exclude others from her property become more limited or restricted the more she make her property accessible to the public. Therefore, in such cases, an owner may not rely on her right to exclude when a gathering commences on her property. Instead, the fact that the owner made her property available to the public could be used to justify why a gathering should be held in close proximity to her property.

This position was confirmed in *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza, Inc*,[152] where the court emphasised that the rights of owners become more circumscribed by the constitutional and statutory rights of others. In this case, picketers, who were members of a food employees' union, organised a picket to commence at the parking and pickup area of a popular shopping mall. The content of the picket involved union members calling for employees to join the union, and calling for business owners to encourage their employees to do so. Joining the union would result in such employees receiving union wages and other related benefits. The

[148] See 3 3 4 above.
[149] See 3 3 4 above.
[150] 326 US 501 (1946).
[151] *Marsh v Alabama* 326 US 501 (1946) 506.
[152] 391 US 308 (1968).

shopping mall in this case was owned by a private body, but the land upon which the mall was situated was owned by the municipality. The land upon which the mall was built was thus leased to the owners of the shopping mall. Even though the mall was privately owned, it was open to members of the public. A ban was imposed on the picketers, which prevented them from picketing inside the shopping mall, as well as in the parking and pickup area. This ban was imposed despite the fact that the picketers were peaceful for the duration of the picket and only picketed in the pickup area and the parking lot. The picketers were instructed by the owners of the shopping mall to conduct their picket in the area immediately outside the gates of the shopping mall, which was situated next to a highway.

The Court of Common Pleas of Blair Country, Pennsylvania, as well as the Pennsylvania Supreme Court awarded an injunction preventing the picketers from picketing and entering the property on which the shopping mall was situated.[153] On appeal, the United States Supreme Court confirmed the principle in *Marsh v Alabama*:[154]

> "[T]he State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put."[155]

The court also held that access to property, which is not ordinarily open to the public, may be denied completely when First Amendment rights are sought to be exercised on the property.[156] However, when the privately owned property is open to the public, First Amendment rights may be exercised on the property subject to limitations. While

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[153] *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza, Inc* 391 US 308 (1968) 312.

[154] *Marsh v Alabama* 326 US 501 (1946) 506.

[155] *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza, Inc* 391 US 308 (1968) 319. According to the First Amendment of the United States Constitution, 1791:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[156] *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza, Inc* 391 US 308 (1968) 320.

the court in this case recognised the fact that First Amendment rights may be limited when they are exercised on privately owned property that is open to the public, these limitations need to be within reason.[157] Such limitations may include size, manner and form limitations, with the purpose of causing as little disruption as possible for other members of the public, as well as other businesses and operations.[158] As a result of these findings, the court ruled that the injunction should be reversed.[159] Therefore, the picketers were allowed to enter the privately owned shopping mall premises.

The principle in *Marsh v Alabama*,[160] was also applied in *Lloyd Corp v Tanner*.[161] The facts of this case is similar to the facts in *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza, Inc,* in that it also concerns a privately owned shopping mall with a pickup and parking area. This shopping centre had standard operating hours during which members of the public were permitted to use the mall facilities.[162] However, members of the public were also permitted to access the shopping mall area outside ordinary operating hours to partake in "window shopping". Despite the encouragement by the owners of the mall for members of the public to window shop outside ordinary operating hours, security had been deployed to keep an eye on any suspicious characters accessing the mall after hours. If any suspicious activity was detected, the security guards were permitted to remove individuals involved in the suspicious activities from the mall premises.

Since the mall commenced its operations, the centre had employed a "no handbilling policy".[163] However, a group of members of the public wished to distribute materials in the shopping mall as part of the handbilling process, who argued that a ban on handbilling infringed upon their First Amendment rights. The Supreme Court of the United States upheld a ban on handbilling at the privately owned shopping mall

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[157] *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza, Inc* 391 US 308 (1968) 321.

[158] *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza, Inc* 391 US 308 (1968) 321.

[159] *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza, Inc* 391 US 308 (1968) 325.

[160] 326 US 501 (1946).

[161] 407 US 551 (1972).

[162] *Lloyd Corp v Tanner* 407 US 551 (1972) 553.

[163] *Lloyd Corp v Tanner* 407 US 551 (1972) 554. Handbilling refers to the distribution of leaflets or similar smaller printed notices by hand.

on the basis that the handbilling itself had no connection to the owners of the property or its employees.[164] The court thus held that due to the lack of such connection, the handbilling could have taken place elsewhere, so as not to infringe upon the property rights of the property owner.

Therefore, courts could merely consider whether a rational link exists between the gathering and the property upon which the gathering takes place. Alternatively, courts could consider whether the gathering could have had its desired effect elsewhere, despite the presence of a rational link between the gathering and the property. Therefore, depending on whether the court adopts a rationality or proportionality test when determining whether sufficient reason for the deprivation exists, it may be able to justify the deprivation of property by considering the proximity of the gathering to the property in question. Courts adopting a rationality test will thus only require that the rational link exists, while courts adopting a proportionality test will require that no less invasive means be present before the deprivation may be justified.

4 4 4 5 Concluding remarks

Should a lawful gathering commence on privately owned property after the necessary procedures in section 2, 3 and 4 of the Gatherings Act have been followed, the property owner may claim that her right in section 25(1) of the Constitution has been infringed. In particular, the property owner may claim that the deprivation permitted by the Gatherings Act is arbitrary. This section sought to identify factors that courts could take into account when determining whether the deprivation permitted by the Gatherings Act is substantively arbitrary. This involved a discussion on what may amount to “sufficient reason” for the deprivation caused by the Gatherings Act.

It was found that the Gatherings Act itself does not provide sufficient reason for gatherings to be held on privately owned property. As a result, “sufficient reason” beyond the scope of the Gatherings Act had to be established. The first of these reasons involve the complexity of constitutional rights being exercised during the course of a gathering. A gathering may involve the exercise of a number of constitutional rights, but this section focused on the right to assemble and demonstrate, as well as the right to freedom of expression. The mere complexity of

[164] *Lloyd Corp v Tanner* 407 US 551 (1972) 564.

constitutional rights involved could, but may not necessarily, be sufficient reason for the deprivation of property permitted by the Gatherings Act not to be considered arbitrary. However, based on the discussion in 4 4 4 3 above, it is clear that the magnitude and extent of constitutional rights being exercised during a gathering is not enough to declare the deprivation arbitrary.

The second of these reasons relate to the importance of having a gathering on privately owned property given the relationship between the gathering and the property itself. The cases in 4 4 4 4 above illustrate that the mere exercise of a constitutional right is insufficient in enforcing such right against the rights of the property owner. These cases indicate that a link needs to exist between the reason for conducting the gathering and the privately owned property upon which the gathering takes place. This link could be between the property owner and the participants of the gathering, or between the property and the purpose of the gathering. In other words, the gathering would need to take place on the privately owned property to give the desired effect to the various constitutional rights being exercised by the participants of the gathering. If the gathering could have taken place elsewhere and still achieved its desired effect, then the deprivation permitted by the Gatherings Act would most likely be substantively arbitrary and thus be inconsistent with section 25(1) of the Constitution. However, this would only be the case where the court decides not to justify the deprivation by adopting a rationality test. Instead, the court would need to favour a proportionality test, and rather consider whether less invasive means could have been employed, without resorting to an outright deprivation or a deprivation with a more invasive effect.

4 5 Conclusion

In this chapter, the question of whether the Gatherings Act permits a deprivation of property in a manner inconsistent with section 25(1) of the Constitution was addressed. In this regard, this chapter established whether private property owners may rely on section 25(1) of the Constitution to claim that the Gatherings Act, through interferences caused by the gathering, permits a deprivation of property in a manner inconsistent with section 25(1) of the Constitution. In addressing this issue, this chapter sought to answer a number of questions.

Firstly, a determination was made as to what types of property owners may rely on section 25(1) of the Constitution and their right not to be deprived of their property in

a manner inconsistent with section 25(1) of the Constitution. It was found that only private property owners may rely on section 25(1) of the Constitution in cases where their rights are affected by the Gatherings Act. It was also found that these private owners may include natural or juristic persons.

Secondly, a determination was made as to what constitutes a deprivation, in order to determine whether the commencement of a "gathering" on privately owned property will amount to a deprivation for purposes of section 25(1) of the Constitution. It was found that a deprivation refers to any interference with the use, enjoyment and exploitation of private property. It was also found that this interference may need to have a legally significant impact for it to be considered a deprivation, but will depend on the facts of each individual case. Based on this definition of a deprivation, the manner in which the Gatherings Act permits a deprivation of property for purposes of section 25(1) of the Constitution was illustrated. It was found that this deprivation occurs through the temporary suspension of the property owner's ability to use, enjoy or exploit her property.

Lastly, the circumstances in which a deprivation may be consistent with section 25(1) of the Constitution was discussed. This included a discussion on whether the deprivation was made in terms of law of general application and whether it is arbitrary. It was found that the Gatherings Act amounts to "law of general application" for purposes of section 25(1) of the Constitution. It was also found that the procedural arbitrariness requirement will depend on whether provision is made for the property owner to be heard. The deprivation could not be procedurally arbitrary, because the Gatherings Act provides the opportunity for the property owner to be heard, by granting the courts the power to rule on whether the gathering may commence. With regard to substantive arbitrariness, sufficient reason for the deprivation had to be established. It was found that because no reason for the deprivation is provided in the Gatherings Act itself, sources beyond the confines of the Gatherings Act had to be considered. In this regard, courts could consider two factors when deciding whether sufficient reason for the deprivation exists. Firstly, the courts could consider the complexity of constitutional rights being exercised by the participants during a gathering. However, it is unlikely that the complexity of these rights is enough to declare the deprivation non-arbitrary. Therefore, the second factor for courts to consider could be the proximity of the gathering to the privately owned property. In this regard, a sufficient link between the reason for the gathering and the privately owned property upon which it takes

place, should exist before the deprivation could be considered non-arbitrary. Furthermore, the courts may also require that the gathering could not have had the same impact elsewhere, before the deprivation is considered non-arbitrary. In this regard, it is up to the courts to consider whether the necessary link, and the desired impact of the gathering, exists.

This chapter aimed to identify circumstances in which the Gatherings Act may permit a deprivation of property in a manner inconsistent with section 25(1) of the Constitution. Factors to be taken into account by the court when deciding whether the deprivation may be justified were suggested and discussed. These factors could serve as a guide when courts have to decide whether the Gatherings Act permits a deprivation of property in a manner inconsistent with section 25(1) of the Constitution.

CHAPTER 5: CONCLUSION

5 1 Introduction

The aim of this thesis was to determine whether the Regulation of Gatherings Act 205 of 1993 ("Gatherings Act") permits a gathering on privately owned property. Once this was established, it had to be determined whether a gathering may cause a deprivation of property in a manner inconsistent with section 25(1) of the Constitution of the Republic of South Africa, 1996. In order to solve the primary research problem, chapters two, three and four sought to address several research aims related to the main research problem.

Chapter two sought to establish the historical framework surrounding the right to assemble and demonstrate. This framework included the position of the right to assemble and demonstrate before, during and after apartheid. In this regard, reference to the legislative suppression of mass government resistance during apartheid, as well as the interpretation of this legislation by the judiciary, was necessary. The recognition of the right to assemble and demonstrate in the new constitutional dispensation was also discussed, which dealt with the various forms of protection of the right and the drafting and recognition of the right in the Constitution.

In light of this history, chapter three sought to outline the new legislative framework regarding the right to assemble and demonstrate. The Gatherings Act, being the primary legislative tool used to give effect to the right to assemble and demonstrate, required a thorough analysis. The requirements for holding a "gathering" in terms of the Gatherings Act, as well as crucial aspects of the definition of a gathering, were central to this analysis. This aided in establishing the types of property to which the Gatherings Act applies, subject to it being "wholly or partly open to the air".

Chapter four sought to establish whether the Gatherings Act impacts section 25(1) of the Constitution, and, if so, the extent of such impact. In order to do so, the beneficiaries of section 25(1), as well as the requirements for a valid deprivation in terms of section 25(1), was discussed. This discussion was used to establish factors that courts could take into account when determining whether the Gatherings Act causes a deprivation of property in a manner inconsistent with section 25(1) of the Constitution.

This chapter will bring together the conclusions drawn in the above chapters. In this regard, the relationship between these conclusions, as well as the significance they hold, will be determined. Ultimately, this chapter will determine whether the research aims set out in chapter one have been reached, and whether a solution to the research problem has been found.

5 2 The right to assemble and demonstrate: A historical analysis

In chapter two, the history of the regulation of protests, which preceded the new constitutional dispensation and the promulgation of the Gatherings Act, was illustrated. This chapter sought to provide a more fruitful understanding of the importance of the promulgation of the Gatherings Act.

It was found that apartheid-era statutes heavily restricted the ability of people to assemble and demonstrate. These statutes granted significant powers to various ministers, the state president, local authorities, as well as magistrates in particular areas to prohibit specific gatherings or a particular class of gatherings.[1] These functionaries also had the power to ban certain persons from attending gatherings.[2] These powers were exercised with little regard to the manner in which it silenced anti-government sentiments. When these actions failed to suppress mass political dissent, the government passed new legislation, or handed down emergency regulations in terms of existing legislation, to ensure the effective suppression of mass political dissent.[3] When faced with cases regarding the exercise of these powers, the judiciary similarly failed in interpreting these statutes with due regard to the political climate in which these cases were heard.[4] However, the judiciary was more willing to consider the political context of the cases before it as the magnitude of political protests and violence intensified in the 1980s.[5]

The announcement by President FW de Klerk declaring the unbanning of political organisations and the release of political prisoners marked the beginning of the end of the legislative framework that enforced the government's apartheid policies. As a

[1] See 2 2 2 above.
[2] See 2 2 2 above.
[3] See 2 2 2 above.
[4] See 2 2 2 above.
[5] See 2 2 2 above.

result, the Multi-Party Negotiation Process commenced,[6] which led to the adoption of the Constitution of the Republic of South Africa Act 200 of 1993 ("Interim Constitution"). The right to assemble, demonstrate and present petitions was recognised and protected in section 16 of the Interim Constitution. Thereafter, the Goldstone Commission was appointed to investigate political violence in the 1980s and 1990s, and the recommendations made to the Commission by a multinational panel of experts served as the framework for legislation regulating assembly. The submissions made by the multinational panel of experts included recommendations relating to notice of a gathering and negotiations before the commencement of a gathering.[7] These submissions led to the promulgation of the Gatherings Act, which – in whole or in part – repealed apartheid-era statutes regulating gatherings.[8] After the promulgation of the Gatherings Act, the Constitutional Assembly Theme Committee 4 on fundamental rights (Freedom of assembly, demonstration and petition) drafted the provisional text for the right to assemble, demonstrate, picket and present petitions. The 1996 Constitution was subsequently adopted by the Constitutional Assembly, and section 17 states that "[e]veryone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."[9]

Chapter two thus sought to illustrate the history that led up to the promulgation of the Gatherings Act. It was found that the regulation of assemblies and demonstrations changed from being heavily-regulated, in which gatherings were prohibited at the whim of various state bodies and institutions, to a constitutionally-protected right that was often adjudicated in terms of the Gatherings Act. The discussion on this history served to provide the ideal platform for an analysis of a "gathering" in terms of the Gatherings Act.

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[6] I Currie & J de Waal *The bill of rights handbook* 6 ed (2013) 5; J Brickhill & R Babiuch "Political Rights" in S Woolman & M Chaskalson (eds) *Constitutional law of South Africa* 2 ed (OS 2007) ch 45 5; IM Rautenbach "Introduction to the bill of rights" in Y Mokgoro & P Tlakula (eds) *Bill of rights compendium* (RS 2015) ch 1A 11.

[7] See 2 3 2 above.

[8] See 2 3 3 above.

[9] Section 17 of the Constitution of the Republic of South Africa, 1996.

5 3 "Gathering" in terms of the Regulation of Gatherings Act 205 of 1993

In chapter three, key concepts from the Gatherings Act were discussed. In this regard, the procedures to be followed immediately before the commencement of a gathering, as well as the extent to which the Act applies to privately owned property, was illustrated.

A "gathering" had to be distinguished from a "demonstration", which are both defined in section 1 of the Gatherings Act. These terms can essentially be distinguished from one another by referring to the number of participants involved in each of them: a demonstration involves 15 people or less, while a gathering involves more than 15 people.[10] This distinction is important, because only a "gathering" is subject to the procedures prescribed in the Gatherings Act. These procedures are found in sections 2, 3 and 4 of the Gatherings Act, and deal with the appointment of key persons prior to the gatherings,[11] notice of a gathering,[12] and other miscellaneous procedures to be followed before the commencement of a gathering.[13] A gathering in terms of the Gatherings Act will thus only be lawful when these procedures are followed.[14]

Given the distinction of a gathering from a demonstration and the procedures to be followed before the commencement of a gathering, it was necessary to determine whether the Gatherings Act permits a gathering on privately owned property. In this regard, the definition of a gathering in section 1 of the Gatherings Act was analysed, which focused particularly on the types of property to which the definition applies. This required an understanding of what exactly constitutes a "public road",[15] and "any other public place or premises wholly or partly open to the air".[16]

A "public road" is defined in the National Road traffic Act 93 of 1996, which repealed the Road Traffic Act 29 of 1989 referred to in the definition of a gathering. This definition offered no scope to extend the definition to privately owned property.[17]

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[10] Section 1 of the Regulation of Gatherings Act 205 of 1993. See also 3 2 1 above.
[11] See section 2 of the Regulation of Gatherings Act 205 of 1993. See also 3 2 2 above.
[12] See section 3 of the Regulation of Gatherings Act 205 of 1993. See 3 2 3 above.
[13] See section 4 of the Regulation of Gatherings Act 205 of 1993. See 3 2 4 above.
[14] See 3 2 above.
[15] Section 1 of the Regulation of Gatherings Act 205 of 1993.
[16] Section 1 of the Regulation of Gatherings Act 205 of 1993.
[17] See 3 3 2 above.

However, it was found that the Gatherings Act applies to privately owned property "wholly and partly open to the air". Despite privately owned property not being mentioned in the definition of a gathering, various sources have indicated that the definition may well extend to privately owned property. This conclusion was reached based on lessons from the Riotous Assemblies Act 17 of 1956,[18] the public-accessibility of the property,[19] as well as the ability of the property owner to lawfully evict persons from the property.[20] Based on the analysis of these concepts, it was found that privately owned property needs to be open to or accessible to the public,[21] or certain members of the public who have a contractual right to be on the property,[22] and should actually be used publicly,[23] in order for the definition of a gathering to extend to privately owned property. Refusal by a property owner to object to the regular entry by persons onto the property, would amount to an invitation for the public to enter the property.[24] Furthermore, privately owned property typically open to the public that is occupied by demonstrators will remain "public", even when measures restricting access during the demonstration are put in place.[25] However, this may change depending on the length of time the demonstrators actually occupy the property.[26]

The interpretation of "any other public place or premises" is subject to the fact that it be "wholly or partly open to the air", before the property in question may fall within the scope of the definition of a gathering. In this regard, a gathering could occur in "any other public place or premises", provided it is also "wholly or partly open to the air". It was found that "wholly or partly open to the air" requires the gathering to be an open-air gathering, or one that is not completely confined inside the walls of a building.[27]

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[18] See 3 3 3 2 above.
[19] See 3 3 3 3 above.
[20] See 3 3 3 4 above.
[21] See 3 3 3 3 above.
[22] See 3 3 3 4 above.
[23] See 3 3 3 3 above.
[24] S Wilson & I de Vos in *Ex Parte: Council for the Advancement of the South African Constitution In Re: Restraint of protest on or near university campuses* Chambers, Johannesburg (22 December 2016) para 104. See also 3 3 3 4 above.
[25] See 3 3 3 5 above.
[26] See 3 3 3 5 above.
[27] See 3 3 4 above.

Chapter three thus concluded that the Gatherings Act extends to privately owned property. However, it will only extend to privately owned property in circumstances where the property is open or accessible to the public, and where the property is actually used publicly. The property should also be open-air, or not confined to the walls of a building. This conclusion leads to the issue of whether a gathering may have any effect on the rights of private property owners, and their right in section 25(1) of the Constitution in particular.

5 4 The effect of holding a "gathering" on privately owned property

In chapter four, the relationship between section 25(1) of the Constitution and the effect of a "gathering" held on privately owned property was addressed. In this regard, the purpose of chapter four was to determine whether section 25(1) of the Constitution may be used by a private property owner to allege that the Gatherings Act permits a deprivation of property in a manner inconsistent with section 25(1) of the Constitution.

It was found that only private property owners may rely on section 25(1) of the Constitution in cases where their rights are affected by the Gatherings Act. These private owners may include natural or juristic persons. Therefore, the state may not rely on section 25(1) of the Constitution in cases where a gathering takes place on publicly owned or state owned property.[28]

Based on the determination of the types of property owners that may rely on section 25(1), the content of section 25(1) was discussed. Section 25(1) of the Constitution states that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." A deprivation refers to any interference with the use, enjoyment and exploitation of private property.[29] This interference needs to have a legally significant impact for it to be considered a deprivation for the purposes of section 25(1) of the Constitution, but this will depend on the facts of each individual case.[30] Based on this definition of a deprivation, the manner in which the Gatherings Act permits a deprivation of property was illustrated. The actions typically associated with a gathering were tested against

[28] *Tshwane City v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC) paras 53-54. See also 4 2 above.
[29] *First National Bank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 57.
[30] See 4 3 above.

the definition of a deprivation.[31] It was found that the entry of persons onto privately owned property, the occupation of privately owned property, the disruption of flow of vehicular and pedestrian traffic, the intimidation of people, and the interference with businesses on the property, temporarily suspends the ability of the property owner to use, enjoy or exploit her property.[32] This temporary suspension amounts to an interference, with enough of an impact to affect the legal entitlements of the property owner, and thus amounts to a deprivation for purposes of section 25(1) of the Constitution.[33]

Based on the finding that the Gatherings Act permits, in certain cases, a deprivation of property, the circumstances in which a deprivation may be consistent with section 25(1) of the Constitution was discussed. A deprivation would only be consistent with section 25(1) if it occurs in terms of law of general application, and when the law does not permit an arbitrary deprivation of property. It was found that the Gatherings Act amounts to "law of general application" for the purposes of section 25(1) of the Constitution.[34] The Gatherings Act would thus be the law that could potentially permit an arbitrary deprivation of property. According to the court in *First National Bank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*,[35] arbitrariness should be split into procedural and substantive arbitrariness.[36] The procedural arbitrariness requirement will depend on whether the Gatherings Act grants the private property owner the opportunity to be heard by means of judicial oversight.[37] It was found that the Gatherings Act provides for judicial oversight in section 6(5), which grants the courts the discretion to make a ruling with regard to the confirmation, amendment or deletion of the notice indicating the intention to hold a gathering.

The substantive arbitrariness inquiry required a more thorough analysis, which involved a determination of whether sufficient reason for the deprivation exists.

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[31] See 4 3 above.

[32] See 4 3 above.

[33] See 4 3 above.

[34] See 4 4 2 above.

[35] 2002 4 SA 768 (CC).

[36] *First National Bank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 67.

[37] AJ van der Walt *Constitutional property law* 3 ed (2011) 270. See also 4 4 3 above.

Sufficient reason can be determined by courts by analysing a number of factors. As a point of departure, the Gatherings Act itself was assessed to establish whether the Act takes the rights of the property owner, as well as the rights of the participants of the gathering, into account before a gathering may proceed.[38] It was found that the commencement of a gathering was not dependent on an analysis of these rights,[39] and as a result hereof, sources beyond the confines of the Gatherings Act had to be consulted to establish whether "sufficient reason" for the deprivation exists.

The complexity of constitutional rights being exercised was the first factor used to determine whether there was sufficient reason for the deprivation. While a number of constitutional rights could be exercised during a gathering, emphasis was placed on the right to assemble and demonstrate, as well as the right to freedom of expression, especially when these rights come into conflict with other constitutional rights. With regard to the right to assemble and demonstrate, the history of the suppression of the right, the role it plays in holding those in power accountable, and the manner in which it upholds the institution of democracy, was considered.[40] Furthermore, the manner in which it stimulates debate, the platform it creates for minorities to express their opinions, and the protection it enjoys in international law, was addressed.[41] With regard to the right to freedom of expression, the history of suppression of the right, the manner in which it serves as a "guarantor of democracy",[42] and the extensive protection it enjoys under international law and other jurisdictions, was considered. However, the importance and complexity of the exercise of these two rights, amongst others, during a gathering, is insufficient to justify the deprivation caused by the Gatherings Act.[43] Instead, in spite of the complexity of these rights, a gathering on privately owned property can only be justified when a relationship between the property and the gathering exists.[44] In this regard, the importance of holding a

[38] See 4 4 4 2 above.

[39] This is, however, subject to section 5(1) and section 5(2) of the Regulation of Gatherings Act 205 of 1993, which grants the responsible officer the power to prohibit a gathering under certain circumstances.

[40] See 4 4 4 3 above.

[41] See 4 4 4 3 above.

[42] *South African National Defence Union v Minister of Defence* 1999 6 BCLR 615 (CC) para 7.

[43] See 4 4 4 3 above.

[44] See 4 4 4 4 above.

gathering in close proximity to privately owned property was used as a second factor to determine whether there was sufficient reason for the deprivation. It was found that a sufficient link needs to exist between the property or property owner, and the gathering or gatherers, before "sufficient reason" for the deprivation can be established.[45] In some cases, "sufficient reason" for the gathering may only exist if the gathering could not have had its desired impact in a place other than the privately owned property upon which the gathering takes place.[46]

While this chapter could not conclusively determine whether the Gatherings Act permits a deprivation of property in a manner inconsistent with section 25(1) of the Constitution, it illustrated circumstances in which sufficient reason for the deprivation may exist. The above analysis used case law and academic commentary to highlight factors courts could take into account when determining whether the deprivation caused by the Gatherings Act may be justified.

5 5 Concluding remarks

In this thesis, it was found that the Gatherings Act permits gatherings on privately owned property in circumstances where the place or premises upon which the gathering takes place is public. These places or premises will be considered public when they are open or accessible to the public, when they are actually used publicly, and when it is open-air or not confined to the walls of a building.

It was also found that a gathering on privately owned property may constitute a deprivation for purposes of section 25(1) of the Constitution. In terms of the requirements for a valid deprivation in terms of section 25(1), it was found that the deprivation is authorised by a law of general application. Furthermore, it appears that the deprivation is not procedurally arbitrary, since the Gatherings Act provides the property owner the opportunity to be heard through its judicial oversight provisions. It was also found that the substantive arbitrariness of the deprivation permitted by the Gatherings Act will need to be decided on a case-by-case basis. However, the courts could consider the complexity of constitutional rights being exercised during a gathering, as well as the importance of the close proximity of the gathering to privately owned property when determining whether sufficient reason for the deprivation exists.

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[45] See 4 4 4 4 above.

[46] See 4 4 4 4 above.

Therefore, it can be concluded that private property owners who open their property to the public can only rely on section 25(1) of the Constitution in situations where the maximum efficacy of the gathering is dependent on holding the gathering on the privately owned property in question. In other words, the absence of a sufficient link between the gathering or gatherers and the property or property owner is necessary before private property owners may successfully rely on section 25(1). In this regard, the solution to the main research problem is two-fold. Firstly, the definition of a gathering extends to privately owned property, but only in certain circumstances. Secondly, the gathering permitted by the Gatherings Act may constitute a deprivation of property if the actions typically associated with gatherings is considered. However, the deprivation may be justified in cases where it is non-arbitrary, and will depend on the facts of each individual case. This will require a context-sensitive analysis of the content and purpose of the gathering, and its relationship with the property or property owner in question.

TABLE OF SOURCES

BIBLIOGRAPHY

Books, chapters in books, journal articles and loose-leaf publications

Branch A & Mampilly Z *Africa uprising: Popular protest and political change* (2015) Cape Town: BestRed

Braun S *Democracy off balance: Freedom of expression and hate propaganda law in Canada* (2004) Toronto: University of Toronto Press

Brickhill J & Babiuch R "Political rights" in Woolman S & Chaskalson M (eds) *Constitutional law of South Africa* 2 ed (OS 2007) Cape Town: Juta ch 45

Cassim R "The legal status of political protest action under the Labour Relations Act 66 of 1995" (2008) 29 *The Industrial Law Journal* 2349-2386

Currie I & De Waal J *The bill of rights handbook* 6 ed (2013) Cape Town: Juta

De Vos P & Freedman W (eds) *South African constitutional law in context* (2014) Cape Town: Oxford University Press

Dlamini Q "Mass action and the law: Can South Africa do without the Regulation of Gatherings Act?" (2009) 1 *African Journal of Rhetoric* 86-107

Du Plessis L & Corder H *Understanding South Africa's transitional bill of rights* (1994) Cape Town: Juta

Du Plessis L *Re-interpretation of statutes* (2002) Durban: LexisNexis

Dugard J *Human rights and the South African legal order* (1978) New Jersey: Princeton University Press

Gargarella R "The right of resistance in situations of severe deprivation" in Pogge T (ed) *Freedom from poverty as a human right* (2007) Oxford: Oxford University Press 359-374

Gray K & Gray SF "Civil rights, civil wrongs and quasi-public space" (1999) 4 *European Human Rights Law Review* 46-102

Gray K & Gray SF "Private property and public propriety" in McLean J (ed) *Property and the constitution* (1999) Oxford and Portland, Oregon: Hart Publishing 11-39

Heymann P *Towards peaceful protests in South Africa* (1992) Pretoria: HSRC Publishers

Hjul P "Restricting freedom of speech or regulating gatherings?" (2013) 27 *De Jure* 451-469

Hoexter C *Administrative law in South Africa* 2 ed (2012) Cape Town: Juta

Ihunna I "The police, protest behaviour and Nigeria's emergent democracy" (2009) 1 *African Journal of Rhetoric* 129-158

Jansen J *As by fire: The end of the South African university* (2017) Cape Town: Tafelberg

Johannessen L "Freedom of expression and information in the new South African constitution and its compatibility with international standards" (1994) 10 *South African Journal on Human Rights* 216-239

Johannessen L "A critical view of the constitutional hate speech provision" (1997) 13 *South African Journal on Human Rights* 135-150

Katzenbach N "Protest, politics and the First Amendment" (1970) 44 *Tulane Law Review* 439-451

Klaaren J & Penfold G "Just administrative action" in Woolman S & Chaskalson M (eds) *Constitutional law of South Africa* 2 ed (OS 2005) Cape Town: Juta ch 63

Layard A "Public space: Property, lines, interruptions" (2016) 2 *Journal of Law, Property and Society* 1-47

Marks M & Bruce D "Groundhog day? Public order policing twenty years into democracy" (2014) 27 *South African Journal of Criminal Justice* 347-376

Marshall B “The protest movement and the law” (1965) 51 *Virginia Law Review* 785-803

Mathews AS *Law, order and liberty in South Africa* (1971) Cape Town: Juta

Mbazira C “Service delivery protests, struggle for rights and the failure of local democracy in South Africa and Uganda: Parallels and divergences” (2013) 29 *South African Journal on Human Rights* 251-275

McKay R “Protest and dissent: Action and reaction” (1966) 20 *Utah Law Review* 20-30

McLean J “Property as power and resistance” in McLean J (ed) *Property and the constitution* (1999) Oxford and Portland, Oregon: Hart Publishing 1-10

Milo D, Penfold G & Stein A “Freedom of expression” in Woolman S & Chaskalson M (eds) *Constitutional law of South Africa* 2 ed (OS 2008) Cape Town: Juta ch 42

Mostert H & Badenhorst PJ “Property and the bill of rights” in Mokgoro Y & Tlakula P (eds) *Bill of rights compendium* (RS 2015) Durban: LexisNexis ch 3FB

Mubangizi JC *The protection of human rights in South Africa: A legal and practical guide* (2004) Cape Town: Juta

Murphy S “Unique in international human rights law: Article 20(2) and the right to resist in the African Charter on Human and Peoples’ Rights” (2011) 11 *African Human Rights Law Journal* 465-494

Naidoo L “Contemporary student politics in South Africa” in Heffernan A & Nieftagodien N (eds) *Students must rise: Youth struggle in South Africa before and beyond Soweto ’76* (2016) Johannesburg: Wits University Press 180-190

Neisser E “Hate speech in the new South Africa: Constitutional considerations for a land recovering from decades of racial repression and violence” (1994) 5 *Seton Hall Constitutional Law Journal* 103-140

Opp K & Roehl W “Repression, micromobilization and political protest” (1990) 69 *Social Forces* 521-547

Page J "Towards an understanding of public property" in Hopkins N (ed) *Modern studies in property law: Volume 7* (2013) Oxford: Hart Publishing 195-216

Preuß U "Associative rights (The right to the freedoms of petition, assembly, and association)" in Rosenfeld M & Sajo A (eds) *The Oxford handbook of comparative constitutional law* (2012) Oxford: Oxford University Press 948-965

Rautenbach IM "The limitation of rights in terms of provisions of the bill of rights, other than the general limitation clause: A few examples" (2001) *Tydskrif vir die Suid-Afrikaanse Reg* 617-641

Rautenbach IM "The liability of organisers for damage caused in the course of violent demonstration as a limitation of the right to freedom of assembly" (2013) *Tydskrif vir die Suid-Afrikaanse Reg* 151-164

Rautenbach IM "Introduction to the bill of rights" in Mokgoro Y & Tlakula P (eds) *Bill of rights compendium* (RS 2015) Durban: LexisNexis ch 1A

Roux T "Property" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (RS 2013) Cape Town: Juta ch 46

Salat O *The right to freedom of assembly: A comparative study* (2015) Oxford and Portland, Oregon: Hart Publishing

Sampson IT "The right to demonstrate in a democracy: An evaluation of public order policing in Nigeria" (2010) 10 *African Human Rights Law Journal* 432-456

Schussman A & Soule S "Process and protest: Accounting for individual protest action" (2005) 84 *Social Forces* 1083-1108

Smith C "The constitutional parameters of student protest" (1972) 1 *Journal of Law and Education* 39-63

Sorabjee SJ "Hate speech dilemma" (1993) 318 *Fortnight* 27-28

Teichner S "The hate speech provision of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 200: The good, the bad and the ugly" (2003) 19 *South African Journal on Human Rights* 349-381

Underkuffler LS “When should rights ‘trump’? An examination of speech and property” (2000) 52 *Maine Law Review* 312-322

Van der Walt AJ *Property in the margins* (2009) Oxford and Portland, Oregon: Hart Publishing

Van der Walt AJ *Constitutional property law* 3 ed (2011) Cape Town: Juta

Van der Walt AJ “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94

Van der Walt AJ “The modest systemic status of property rights” (2014) 1 *Journal of Law, Property, and Society* 15-106

Van der Walt AJ “Property law in the constitutional democracy” (2017) 28 *Stellenbosch Law Review* 8-25

Van der Westhuizen J “Freedom of expression” in Van Wyk D, Dugard J, De Villiers B & Davis D (eds) *Rights and constitutionalism – The new South African legal order* (1994) Cape Town: Juta 264-291

Van Rooyen JCW “Dignity, religion and freedom of expression in South Africa” (2011) 67 *HTS Theological Studies* 1-12

Wessels L *My rights! Your rights? Let’s talk!* (2007) Pretoria: LAPA Publishers

Woolman S & Botha H “Limitations” in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (RS 2013) Cape Town: Juta ch 34

Woolman S & De Waal J “Voting with your feet” in Van Wyk D, Dugard J, De Villiers B & Davis D (eds) *Rights and constitutionalism – The new South African legal order* (1994) Cape Town: Juta 292-337

Woolman S “Freedom of assembly” in Woolman S & Chaskalson M (eds) *Constitutional law of South Africa* 2 ed (OS 2005) Cape Town: Juta ch 43

Woolman S “My tea party, your mob, our social contract: Freedom of assembly and the constitutional right to rebellion in *Garvis v SATAWU* (*Minister for Safety & Security,*

Third Party) 2010 (6) SA 280 (WCC)" (2011) 27 *South African Journal on Human Rights* 346-353.

Woolman S "Assembly, demonstration and petition" in Currie I & De Waal J *The bill of rights handbook* 6 ed (2013) Cape Town: Juta 377-395

Woolman S "Association" in Currie I & De Waal J *The bill of rights handbook* 6 ed (2013) Cape Town: Juta 396-419

Woolman S "You break it, you own it: South African assembly jurisprudence after *Garvis*" (2015) 9 *Vienna Journal on International Constitutional Law* 548-571

Theses and Dissertations

Dhliwayo P *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch (2015)

Van der Sijde E *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch (2015)

Internet sources

Constitutional Assembly Theme Committee 4 report on fundamental rights "Freedom of assembly, demonstration and petition" (1995) *Justice* <http://www.justice.gov.za/legislation/constitution/history/REPORTS/tc4-ASSEMBLY.PDF> (accessed 21-07-2017)

The Ministry of Police "Policy and guidelines: Policing of public protests, gatherings and major events" (2011) *Police secretariat* <http://www.policesecretariat.gov.za/downloads/policies/policing_public_protests_2013.pdf> (accessed 02-04-2017)

Wilson S & De Vos I "Ex Parte: Council for the Advancement of the South African Constitution In Re: Restraint of protest on or near university campuses" (2016) *Council for the Advancement of the South African Constitution* <http://www.casac.org.za/wp-content/uploads/2017/01/CASAC-Legal-Opinion-Restraint-of-protest-on-or-near-Universities.pdf> (accessed 27-03-2017)

TABLE OF UNPUBLISHED SOURCES

Botha H "Fundamental rights and democratic dissent: Reflections on freedom of assembly in the 'protest capital of the world'" Paper presented at third bi-annual German-South African dialogue on democracy entitled *The preconditions of democracy* (2016) The University of the Western Cape (Copy of paper on file with author)

Botha H "Protest action and democracy: Structural power and the fundamental rights to assemble and demonstrate in post-apartheid South Africa" Paper presented at *Rethinking the encounter with the police: From Marikana to Ferguson* (2017) The University of the Western Cape (Copy of paper on file with author)

Le Roux W "Between a brick and a ballot? Rethinking the relationship between disruptive and deliberative democracy" Paper presented at *Rethinking the encounter with the police: From Marikana to Ferguson* (2017) The University of the Western Cape (Copy of paper on file with author)

TABLE OF CASES

Australia

Hughes v Fingleton (1977) 17 SASR

Semple v Carson (1984) 35 SASR

Semple v Howes (1985) 38 SASR

Germany

BVerfGE 128, 226 (2011), *Fraport*

South Africa

Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport 2015 10 BCLR 1158 (CC)

Dawood v Minister of Home Affairs 2000 3 SA 936 (CC)

Dikoko v Mokhatla 2006 6 SA 235 (CC)

Dudley v Minister of Justice 1963 2 SA 464 (AD)

During NO v Boesak 1990 3 SA 661 (A)

Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 1996 4 SA 744 (CC)

First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 4 SA 768 (CC)

Fourways Mall (Pty) Ltd v South African Commercial Catering 1999 3 SA 752 (W)

Garvis v SATAWU (Minister for Safety & Security, Third Party) 2010 6 SA 280 (WCC)

Growthpoint Properties Limited v South Africa Commercial Catering and Allied Workers Union (SACCAWU) 2010 JDR 1015 (KZD)

Hotz v UCT 2016 4 All SA 723 (SCA)

Islamic Unity Convention v The Independent Broadcasting Authority 2002 4 SA 294 (CC)

Minister of Defence and Military Veterans v Motau 2014 8 BCLR 930 (CC)

Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government & Housing in the Province of Gauteng 2005 1 SA 530 (CC)

National Credit Regulator v Opperman 2013 2 SA 1 (CC)

Offit Enterprises (Pty) Ltd v Coega Development Corporation 2011 1 SA 293 (CC)

PG Castel NO v Metal & Allied Workers Union 1987 4 SA 795 (A)

Philips v the Director of Public Prosecutions 2003 4 BCLR 357 (CC)

R v Khan 1955 3 SA 177 (AD)

R v Lan 1956 2 SA 246 (AD)

Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government 2009 6 SA 391 (CC)

Rhodes University v Student Representative Council of Rhodes University 2017 1 All SA 617 (ECG)

S v Khumalo 2002 5 SA 401 (CC)

S v Makwanyane 1995 3 SA 391 (CC)

S v Mamabolo 2001 3 SA 409 (CC)

S v Mtutuzeli 1979 1 SA 764 (T)

S v Turrell 1973 1 SA 248 (C)

S v Zuma 1995 2 SA 642 (CC)

Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape 2015 6 SA 125 (CC)

South African Diamond Producers Organisation v Minister of Minerals and Energy (CCT234/16) [2017] ZACC 26 (24 July 2017)

South African National Defence Union v Minister of Defence 1999 6 BCLR 615 (CC)

South African Transport and Allied Workers Union v Garvas 2013 1 SA 83 (CC)

The Treasure Chest v Tambuti Enterprises (Pty) Ltd 1975 2 SA 738 (A)

Tshwane City v Link Africa (Pty) Ltd 2015 6 SA 440 (CC)

Tsoaeli v S [2016] ZAFSHC 217 (17 November 2016)

United Democratic Front (Western Cape Region) v Van der Westhuizen NO 1987 4 SA 926 (C)

Victoria and Alfred Waterfront (Pty) Ltd v Police Commissioner, Western Cape (Legal Resources Centre as Amicus Curiae) 2004 4 SA 444 (C)

Zondi v MEC for Traditional and Local Government Affairs 2005 (3) SA 589 (CC)

United States

Amalgamated Food Employees Union Local 590 v Logan Valley Plaza, Inc, 391 US 308 (1968)

Lloyd Corp v Tanner, 407 US 551 (1972)

Marsh v Alabama 326 US 501 (1946)

Zimbabwe

In Re Munhumeso 1995 1 SA 551 (ZS)

TABLE OF CONSTITUTIONS

Basic Law for the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) 1949 (print version 23-12-2014, translated by Tomuschat C and Currie DP; revised by Tomuschat C and Kommers DP in co-operation with the Language Service of the German Bundestag < https://www.btg-bestellservice.de/pdf/80201000.pdf> (accessed 23-07-2017)

Constitution of the Republic of South Africa, 1996

The Belgian Constitution, 1831

The Constitution of Pennsylvania, 1776

The Constitution of the United States, 1791

TABLE OF LEGISLATION

Australia

Police Offences Act 1953-1983 (No. 55 of 1953-No. 69 of 1983)

South Africa

Black Administration Act 38 of 1927

Companies Act 71 of 2008

Constitution of the Republic of South Africa Act 200 of 1993

Criminal Law Amendment Act 8 of 1953

Customs and Excise Act 91 of 1964

Demonstrations in or near Court Buildings Prohibition Act 71 of 1982

Gatherings and Demonstrations at or near the Union Buildings Act 103 of 1992

Gatherings and Demonstrations in the Vicinity of Parliament Act 52 of 1973

Gauteng Local Government Ordinance 17 of 1939

General Law Further Amendment Act 92 of 1970

Internal Security Act 74 of 1982

Labour Relations Act 66 of 1995

Local Government: Municipal Systems Act 32 of 2000

National Credit Act 34 of 2005

Promotion of Administrative Justice Act 3 of 2000

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Public Safety Act 3 of 1953

Regulation of Gatherings Act 205 of 1993

Riotous Assemblies Act 17 of 1956

Suppression of Communism Act 44 of 1950

Trespass Act 6 of 1959

Government Gazette notices

Government Gazette 5758, 30 September 1977

TABLE OF INTERNATIONAL AND REGIONAL INSTRUMENTS

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217

International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171

United Nations Declaration on the Elimination of All Forms of Discrimination (adopted 20 November 1963) GA Res 1904 (XVIII)

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 (III)